TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 335.

ROY H. ROBINSON, ADMINISTRATOR OF THE ESTATE OF JOHN C. ROBINSON, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 17, 1922.

(28,836)

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INDEX.

	Original.	Print.
Proceedings in the Court of Claims	1	1
Petition	1	1
General traverse	21	12
History of proceedings	21	12
Argument and submission	21	12
Findings of fact	22	13
Conclusions of law	32	23
Opinion, Campbell, C. J.	32	23
Judgment	36	27
Suggestion of death and substitution of counsel	36	27
Petition for and order allowing appeal	36	27
Clerk's certificate	37	27
Stipulation as to parts of Exhibit A to be printed	38	28
Clerk's certificate to Exhibit A	43	29
Exhibit A—Extracts from specifications	21	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 23, 1922.

1 In the Court of Claims.

No. 30800.

JOHN C. ROBINSON

vs.

THE UNITED STATES OF AMERICA.

I. *Petition.*

Filed January 19, 1911.

To the Honorable, the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, John C. Robinson, respectfully represents:

I.

That he is a citizen of the United States and a resident of the City of Chicago, in the State of Illinois.

II.

That on the 30th day of August, 1905, a contract was executed between the United States of America acting through Leslie M. Shaw, Secretary of the Treasury, and the Claimant, whereby the Claimant agreed to furnish all labor and materials and perform all the work required for the interior finish of the New Custom House at New York City, State of New York, in accordance with certain plans, specifications, correspondence and drawings attached to or
2 made a part of said contract, less certain enumerated modifications, and the United States agreed to pay him therefor a sum in excess of one million dollars, the work provided for in the contract to be completed on or before October 15, 1906.

That the claimant promptly entered on the performance of the contract and, so far as not interrupted or delayed by orders from the Government to suspend the work, prosecuted the same diligently.

III.

That certain work deemed desirable was omitted from the aforesaid contract executed on August 30, 1905, by reason of lack of funds therefor, and subsequently and before the time for completion of the contract hereinbefore referred to, additional moneys for construction of the New Custom House were appropriated by Congress, whereupon the claimant was peremptorily ordered and directed by the United States on or about October 22, 1906, to furnish the labor

and materials and perform all the work required for the restoration to the interior finish of the New Custom House aforesaid of the certain items hereinbefore referred to omitted therefrom in the original contract though embraced in the original proposals, and the United States notified him it would allow him therefor an additional sum in excess of $200,000 and the time of completion of the original contract and supplemental order was by the United States placed at June 1, 1907, but the contractor never was requested to, and in fact never did, assent to said modifications and changes, the contractor having no alternative but that of submission to the arbitrary
3 act of the United States. Claimant did, however, faithfully endeavor to complete said contract by the amended date so as aforesaid arbitrarily fixed by the Secretary of the Treasury but was prevented therefrom by acts of the United States and its agents.

IV.

The claimant continued in the diligent performance of the work provided for in the original executed contract and promptly entered upon and thereafter prosecuted with great expedition, diligence and skill the work provided for in the supplemental or second contract and also performed, by direction and at the request of the United States, certain other extra work and furnished certain other extra material not provided for in either of the hereinbefore recited contracts, which were accepted and used by the United States and for which claimant was compensated in part, either by allowances of payments, while certain work was not performed and certain materials were not furnished though the same was provided for in the contract by reason of orders to omit the same received from the United States and accepted by the claimant in accordance with the provisions of the contracts hereinbefore referred to.

V.

That the United States made certain payments from time to time to claimant on account of work performed under the aforesaid contracts, and, on the first day of October, 1907, formally accepted the New York Custom House from claimant and entered into full
4 and complete possession of the same, though claimant thereafter continued to and did perform certain work and furnish certain materials.

VI.

That claimant after acceptance of the building by the United States demanded payment to him of the full amount due to him under the aforesaid contracts and for extra labor and materials furnished by him at the direction and request of the United States, and accepted and used by the United States, but said demand was by the United States refused and proffer made him of a less sum than due by reason of illegal deduction from the contract price made by the United States and refusal to pay certain damages arising out of

prosecution of the contracts and extra work aforesaid for which the United States is liable to claimant, whereupon claimant refused to accept the proffer made as in full settlement of his just claims and demands. A full and detailed statement of said just claims and demands of claimant and the hereinbefore recited illegal deductions made by the United States is hereinafter set forth in detail.

VII.

That the United States unlawfully deducted from the amount due claimant on account of the performance of the contracts and extra work aforesaid the sum of $50,820, as and for liquidated damages or penalty for 121 days in the completion of the building from June 1, 1907, to date of acceptance of the same from claimant October 1, 1907, and has refused to pay claimant this part or amount of
5 the contract price and unlawfully retains and detains the same from claimant. That this unlawful detention of $50,820 from claimant is on the alleged ground that the same is in accordance with the terms of the contracts between the parties and more especially the following provisions of said contracts:

(Contract executed August 30, 1905.)

"It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the party of the second part and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of $120 for each and every day the said party of the second part shall be in default, which said sum of $4.20 per day, in view of the difficulty of estimating such damages with exactness, is hereby expressly fixed, estimated, computed, determined and agreed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to recover compensation or damages for the performance of this contract at the time herein stipulated or provided for.

* * * * * * *

6 It is further covenanted and agreed that the said party of the first part shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever, in the opinion of the Architect of the building, or of the Supervising Architect, it may be necessary for the purposes or advantages of the

work, and upon such occasion or occasions the said part of the second part shall, without expense to the United States, properly cover over, secure and protect such of the work as may be liable to sustain injury from the weather or otherwise; provided that for all such suspensions and other delays caused by the said party of the first part the party of the second part shall be allowed one day additional to the time herein stated for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect; provided that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the party of the first part."

Supplemental or Second Contract executed October 22, 1906.

"It is understood and agreed that it is a condition of this action that time for completion of all the work included in your contract, and that hereby ordered is June 1, 1907, and that such extension is in lieu of all additional time which accrues to you on account of delays by the Government; * * * also that, within eight (8) days you deliver to this Department a schedule indicating the points of advancement you will reach on the first day of each month up to and including June 1, 1907, so arranged as to insure the completion of the building on or before that date. Should you elect not
7 to file such schedule by October 31, 1906, the Department will definitely direct the amounts of work to be performed in each respective month, in such sequences as appears most advantageous; and you are further advised if at any time it appears the work required for any month is not satisfactorily completed, such fact will be taken as conclusive evidence that you are in default under your contract, and the Department, in view of such default, acting under the rights reserved by such contract, will proceed to finish the building at your expense and the expense of your bondsmen."

That the foregoing provisions and the contracts in which they are incorporated are not lawful warrant for and do not apply to the work performed by claimant under said contracts. That it was a condition of said contracts, and especially of the time-penalty provision thereof that the United States at all times during the progress of the work under said contracts should have the several parts of the building in condition for performance of his contract by claimant and should not require or order the claimant to suspend or delay performance of his contractual obligations and also that it should not delay or embarrass claimant in the performance of his contracts by reason of unreasonable, capricious and unfair objections to labor or materials performed or furnished by him under said contracts. That nevertheless and notwithstanding, the United States did require and order claimant to suspend or delay performance of work under his contract during the due and regular performance thereof and compelled him to delay various and many parts of his work under his

contract and did thereby prevent performance of claimant's contracts within the time named therein and did greatly prolong the
8 time required for completion of claimant's contract whereby heavy damage was occasioned to claimant. That the number of days of delay or suspension in claimant's work ordered by the United States, and which orders claimant was required to observe, far exceed the number of days delay in acceptance of the building and claimant's work thereon by the United States. That claimant, when the supplemental contract executed October 22, 1906, was made, protested that the time was exceedingly short for performance of the work and that the contract could be performed within the limit of time prescribed only with the full cooperation of other contractors, the Architect and the officials of the Treasury Department of the United States and reasonableness on the part of all parties. The claimant was assured of such reasonableness and cooperation and that the date named was but to insure diligence on the part of the claimant and that the United States simply desired to have the building ready to move into by June 1, 1907. That claimant was assured the United States would take over the building and subsequently permit the completion of such work as did not prevent the occupancy or use thereof, and with this understanding claimant agreed to the contract of October 22, 1906. That, notwithstanding the shortness of time allowed claimant for performance of his contract and the heavy time penalty provided for therein, numerous orders were given Claimant to suspend or delay work on which he was engaged or ready to commence and thereafter continued in force and effect over his objection, some of these orders being in force and effect for months and up to and after the time named for completion of claimant's contract, June 1, 1907. That the Architect was capricious, unfair and unreasonable in the supervision
9 and judgment of work, labor and materials and unreasonably and unwarrantably rejected material and labor after the same were long in place though having full and early opportunities for inspection of materials and of labor. That claimant was forced to many and frequent appeals from the Architect, in all of which appeals claimant was sustained, and likewise was subjected to unreasonable and capricious delays and losses in other details of performance of his contract that were vexatious, harassing and embarrassing, but were submitted to rather than vex the appellate authorities with the same. That these capricious, unfair and unreasonable acts delayed claimant in performance of his contract and increased the cost thereof. That the building was not made ready by the United States for performance by claimant of his contract and claimant was delayed thereby. That notwithstanding these embarrassments claimant prosecuted performance of his contract with extraordinary diligence and, in view of the magnitude of the work to be performed and the conditions of its performance, made unprecedented progress. That the building, so far as concerns claimant's contract, was in condition for the United States on June 1, 1907, to have begun occupancy and use thereof, and claimant thereafter continued his work of fitting the same for occupancy, and early in July,

1907, said building was ready for occupancy, save where orders of suspension of work were in force and effect, or the contractor had been prevented from completion of his work by orders on the part of the Government. That the United States did not occupy the building at this time because it was not prepared with the materials and labor it expected to furnish or perform directly and was not so prepared until after it formally took over the building on October
10 1, 1907, and the United States thereafter did not, in fact, use or occupy said building until thirty days thereafter and then such use and occupancy was only in part. That claimant did and performed all acts and things which by his said contract he had undertaken to do and perform and completed his said contracts and delivered his work, labor and materials to the United States and the United States has finally occupied the same. That claimant was in nowise responsible for the said delays and is not subject to have any deduction made from the contract price to be paid by the United States. That the United States suffered no damage or loss by reason of said delays. That the claimant has protested against deduction, retention and detention from its contract price of the sum of $50,820 or any part thereof on account of delay in performance of claimant's contract and has reserved the right to claim, sue for and collect the said sum of $50,820 unlawfully withheld from him as aforesaid. That claimant also demands the sum of $25,000, as damages for the delays occasioned claimant by the United States and for the losses sustained by reasons of the unreasonable, unfair and capricious acts of the United States, its agents and servants.

VIII.

That the United States on the completion of claimant's contract deducted, retained and detained and still deducts, retains and detains from the amount admittedly due claimant the sum of $12,000. That the United States has stated that this sum of $12,000 is retained wherewith to complete unfinished items, if any, existing in the work contracted to be performed by claimant and that if it be not required to be expended to complete claimant's contract it, or any un-
11 expended part thereof, will be paid over to claimant. That said sum has been retained since October 1, 1907. That claimant has demanded, but has been unable to obtain a statement of what, if any, part of this retained sum of $12,000 has been expended by the United States on account of completion of claimant's contract and for what the sum or sums used were expended, but no statement has been furnished claimant and claimant is without particulars or information regarding the same. That claimant has demanded payment of said retained sum of $5,000, but the same has been refused. That claimant denies that the United States is entitled to withhold said sum of $12,000 or any part thereof from him. That the United States is justly indebted to claimant on account of the acts and things set forth in this paragraph in the sum of $12,000 with interest thereon at the rate of six per cent per annum from the first day of October, 1907, as for work, labor, materials and money of claimant had and received by the United States.

IX.

That the claimant also performed, by the direction and at the request of the United States, certain extra work and furnished certain extra materials all of which were accepted and used by the United States. That for the certain extra work and certain extra materials so furnished the United States allowed compensation to claimant as follows:

A. For setting forward marble fronts of elevators 1 to 6 inclusive	$1,932.52
12	
B. For setting basin slab in basement of Post Office portion of new Custom House	50.00
C. For laying extra area of ceramic tile in sub-basement	70.20

That these allowances are below a reasonable, fair and just compensation to claimant for the work, labor and materials performed, in some instances are not the actual cost of furnishing and performing the same, and allow nothing to claimant for his cost of supervision and administration of the same and for his reasonable profit thereon and were allowed arbitrarily, unreasonably and capriciously. That a fair, reasonable and just compensation for said work, labor and materials is as follows:

A. For setting forward marble fronts of elevators 1 to 6, inclusive	$2,432.52
B. For setting basin slab in basement of Post Office portion of new Custom House	94.56
C. For laying extra area of ceramic tile in sub-basement	80.00

That the United States is justly indebted to the claimant on account of the acts and things set forth in this paragraph in the sum of $554.36 with interest thereon at the rate of six per cent per annum from the first day of October, 1907, as for work, labor and materials and money of claimant had and received by the United States.

X.

That the United States on the completion of claimant's contract deducted, retained and detained and still deducts, retains and detains from the amount due claimant under the provisions of his contract the further and additional sum of $9,513.68 on ac-
13 count of alleged omissions and defects in the work, said sum, according to a statement furnished claimant by the United States, being made up as follows:

D. For omission of protective coverings, interior marble work	$2,500.00
E. For sheet glass in corridor sash above third floor in lieu of plate glass specified	571.00

F. On account of experimental floor laid by the Department	500.00
G. For use of iron in lieu of bronze for sash operating device in the sub-basement, Bowling Green front..	127.03
H. For damage to patent lights in areas, half charged to claimant	167.90
I. For lessened expense due to shortening of mail chute	92.00
J. For failure to remove concrete under wood block floors	1,350.00
K. For changes in marble work in elevator halls, 6th and 7th floors	487.00
L. For failure to supply chair rail to certain rooms..	196.00
M. For reduced cost of varnish	154.90
N. For photographs not delivered	174.85
O. For inferior marble in rotunda and main hall....	3,000.00
P. For storage	97.00
Q. For repairing conduits to panel boxes	105.00

That the deduction, retention and detention from claimant of the amounts specified in items D $2,500, E $571, I $92, J $1,350, K $478, L $196, N $174.85, O $3,000, P $97, and Q $105, are without lawful warrant or authority in that as to each and every of these items claimant complied fully with the terms and provisions
14 of his contract, except that item L $196, is not embraced within the provisions of his contract. That the deductions, retentions and detentions in the following items are arbitrary, unreasonable and unjust and in excess by the amounts hereinafter stated of fair, reasonable and just deductions on account of the said several items: F $500, excessive to the extent of $110; G $127.03, excessive to the amount of $20; H $167.90, excessive to the amount of $142.90; M $154.90, excessive to the amount of $57.32. That fair, reasonable and just deductions on account of the matters and things set forth in this paragraph would be $619.61. That the deduction, retention and detention from claimant of the further sum of $8,894.07 is unlawful and the United States, on account of the matters and things set forth in this paragraph, is justly indebted to claimant in the sum of $8,894.07 with interest thereon at the rate of six per cent per annum from October 1, 1907, as for work, labor and materials and money of claimant had and received by the United States.

XI.

That claimant under the provisions of the contract aforesaid furnished work, labor and materials to the United States that were in accordance with the terms, conditions and requirements of his contract and was entitled to have the same by the United States accepted, but the United States through and by its Architect unreasonably, unjustly and capriciously rejected the same and claimant was compelled unjustly, unreasonably and without warrant to expend divers large sums of money in replacing the work, labor and ma-
15 terials so unquestionably and capriciously rejected. That the reasonable value of the expense to which claimant was so un-

reasonably and capriciously put is the sum of Fifteen Thousand dollars, of which the largest part is for Italian marble that claimant was compelled at heavy additional expense to procure from abroad in place of the best grade of domestic marble required by the provisions of claimant's contract and furnished by claimant, but rejected by the architect. That the United States is justly indebted to claimant on account of the acts and things set forth in this paragraph in the sum of $15,000 with interest at six per sent per annum from October 1, 1907, as for work, labor and materials and money and as for damages under the contract aforesaid due claimant by the United States.

XII.

That by reason of the delays and suspension of claimant's performance of claimant's contract and the unreasonable, unjust and capricious acts of the United States in not having the building ready for performance of Claimant's contract and the arbitrary, unreasonable and capricious acts of the United States, and of the Architect representing the United States, claimant was compelled to undergo expenses for supervision and administration in the performance of his contract to the amount of $4,000 which he would not have been compelled to undergo but for the aforesaid unlawful acts and things whereby a rightful claim and demand has arisen in his behalf against the United States in the sum of $4,000 with interest thereon from October 1, 1907, at the rate of six per cent per annum, and the United States is justly indebted to claimant in said sum of $4,000
16 with interest thereon at the rate of six per cent per annum from October 1, 1907, as for work, labor and materials of claimant had and received by the United States and as for damages due claimant under the contract aforesaid by the United States.

XIII.

That the United States in addition to the sums specially set forth in Paragraph IX of this petition and in addition to the sums set forth in the several other paragraphs of this petition is indebted to claimant in the further and additional sum of $6,772.94 with interest thereon at the rate of six per cent per annum from October 1, 1907, for certain other additional extra work, labor and materials performed or furnished by claimant by the direction and at the request of the United States and all of which were accepted and used by the United States and compensation for which has either been wholly refused or allowed only in part, said refusal of any or just, reasonable and adequate compensation being unreasonable, unjust, capricious, arbitrary and without lawful warrant. That the details of claimant's rightful claims and demands as hereinbefore stated in this paragraph of claimant's petition are as follows:

S.	For modification of screen, lobby, 201A	$156.00
T.	For steel framing for partition, lobby 201A	85.00
U.	For cutting down and rebuilding sub-basement doors between columns 20-32, 21-33, 99-110 and 117-118	29.50
V.	For tearing down and rebuilding of brick work old sump	43.73
W.	For cutting out and rebuilding pipe shaft in room No. 513	40.04

17

X.	For additional marble architrave around doors for vestibules, No. 117 A and No. 114A	360.00
Y.	For marble step and riser in post office Lobby	12.50
Y1.	For extra plastering to cover defects of protruding pipes not provided for in plans	52.05
Y2.	For extra furring and plastering around steel column out of place in elevator shaft No. 3	31.30
Y3.	For rebuilding oak sash constructed on specific orders from the United States over claimant's protest and subsequently reconstructed by claimant	1,243.69
Y4.	For expense of pumping and repairs to toilet rooms in post office portion of building not provided for in claimant's contract and for which he was not responsible, 18 months @ $50	900.00
Y5.	For tearing out sleepers and placing concrete rooms having parquet flooring	207.80
Y6.	For changes in rooms 608, 201A, 237, 235, 316, in rooms for Secretary of Treasury and Engineer's Office, doors near columns 117 and 111 and between rooms 612 and 613 (extra allowance reasonably due)	3,202.00
Y7.	For changes in post office first story	357.08
Y8.	For claimant's administration expense in modification of plastering, Bridge street stairs	52.25

That the United States is justly indebted to claimant on account of the acts and things set forth in this paragraph in the sum of $6,772.94 with interest thereon at the rate of six per cent per annum from October 1, 1907, as for work, labor and materials and money of claimant had and received by the United States.

18

Recapitulation.

XIV.

That a recapitulation in the way of a summary statement of the several sums due by the United States to claimant on account of the performance by claimant of his hereinbefore stated contract with the United States and extra work, labor and materials ordered and damages due by the United States to claimant on account of the contract

and extra work, labor and materials ordered, furnished and accepted is as follows:

1. Damage or penalty money justly withheld for 121 days alleged delay at $120 per day	$50,820.00
2. For damages	25,000.00
3. Amount deducted to complete any unfinished items for which no statement has been rendered	12,000.00
4. Extra work, labor and materials as specified in paragraph IX	554.36
5. For unlawful deduction and retention on account of alleged omissions and defects	8,894.07
6. For extra costs and expenses due to arbitrary, unreasonable and capricious rejection of work, labor and materials	15,000.00
7. For additional and extra administration expenses due to arbitrary and capricious acts of the United States and delays caused by the United States	4,000.00
8. For extra work, labor and materials ordered, furnished and accepted, but not allowed as specified in paragraph 14	6,772.94
Total	$123,041.37

19 with interest on each and every item of this recapitulation statement at six per cent per annum from October 1, 1907, for which amount claimant makes demand and claim against the United States as for work, labor and materials and money of claimant had and received by the United States and damages unlawfully suffered by the claimant from the United States in the performance of claimant's contract with the United States.

XV.

That claimant is the owner of the claim above set forth and no assignment of the same or any part thereof or interest therein has been made, but claimant reserves the right of liability over against his subcontractors on account of any act, matter or thing hereinbefore set forth, if any, for which this Honorable Court may hold that the United States is not liable and as to which claimant's subcontractors, if any, are responsible. That claimant is entitled justly to receive from the United States under its said contract or contracts the sum of $123,041.37 with interest thereon at the rate of six per cent per annum from the first day of October, A. D. 1907, after allowing all just credits and offsets. That claimant has made demand upon the United States for the payment of the said sum, but the same has not been paid nor any part thereof. That claimant has always borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against it.

Wherefore the claimant prays for judgment against the United States in the sum of $123,041.37 with interest thereon at the rate of six per cent per annum from the first day of October, 1907, and for such further relief as he may be entitled to receive both at law and in equity in the premises.

JOHN C. ROBINSON,
Claimant.

JAMES K. JONES,
Attorney for Claimant.
CHARLES J. KAPPLER,
CHARLES H. MERILLAT,
Of Counsel.

STATE OF MISSOURI,
City of St. Louis, ss:

John C. Robinson being duly sworn deposes and says that he is the claimant named in and who subscribed to the foregoing petition; that he has read the same and knows the contents thereof and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 6th day of January, 1911.

[SEAL.] CHAS. R. GRAVES,
Clerk Circuit Court.

II. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. *History of Proceedings.*

On December 4, 1920, on motion made therefor, Roy H. Robinson, administrator of John C. Robinson, deceased, was substituted as claimant herein.

On February 23, 1921, the case was argued and submitted on merits.

On June 13, 1921, the Court filed tentative findings of fact and allowed both sides until October 1, 1921 to file objections thereto.

IV. *Argument and Submission of Case.*

On October 17, 1921, this case was argued and submitted on tentative findings by Charles H. Merillat, for plaintiff, and by William S. Ryan, Esq., for defendant.

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V. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.*

Entered December 5, 1921.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Finding of Facts.

I.

By an act of Congress, approved March 2, 1899, an appropriation was made for the construction of a United States customhouse in the city of New York, and the Secretary of the Treasury authorized and directed to construct such building.

Under the provisions of said act, the Secretary of the Treasury, under competitive bids, accepted the plans, drawings, and specifications for the building proposed and submitted by Cass Gilbert, an architect of New York City, and on January 29, 1900, contracted with said architect, for a fee or compensation of 5 per cent of the cost of construction of the building, to render all the services required in the preparation of detailed plans, working drawings, designs, specifications, estimates, etc., or changes therein required to be made, in connection with the erection and completion of the building, and to locally supervise its erection and completion, in strict and full accordance with the terms, conditions, and requirements of the contract for its construction.

II.

The work of construction of the building was subdivided into several principal parts, such as the excavation and foundation work, the walls and structural-steel work, the mechanical equipment, the interior finish, etc., and separate contracts were let for these different parts of the building. Work on the building began and proceeded in the order, generally, of the different parts of the work as given above, the performance of the work under the different contracts, however, generally overlapping more or less in point of time.

23 The construction work having progressed to the stage where the interior finishing could be commenced, the Treasury Department, through its Supervising Architect, on March 9, 1905, advertised for bids for the installation of the interior finish of the building; and because of a probable shortage in the funds available for the work, alternative proposals or bids were requested providing for the omission of certain work and the substitution of less expensive materials in some instances than those provided for in the main proposals. Of the five bidders for the work the lowest two were the plaintiff's decedent, John C. Robinson, of Chicago, and John Pierce, of New York City, the latter of whom was the contractor for the walls and structural-steel work of the building, which work had not yet been completed.

In the main bids of Robinson and Pierce, Robinson was the lowest by about $22,000. In the alternative bids, which were made on somewhat different bases in the matter of the kinds of alternative materials, and especially of the marbles proposed to be substituted, Pierce was lowest. The bids were referred by the Treasury Department to the architect of the building, the said Cass Gilbert, for his consideration and recommendation; whereupon he decided Pierce to be the lowest bidder; and, as all the bids were yet above the amount of the funds available for the work, said Pierce was requested to submit a proposal for a reduction in his bid on account of some 32 items of omissions and changes proposed with a view to bringing the bid within the funds available for the building. Pierce thereupon submitted a proposal for such reduction, which brought his bid within the available funds, and said architect, Gilbert, recommended that he be awarded the contract. The Secretary of the Treasury, however, upon protest by Robinson and a consideration of the facts in the case, decided that Robinson, by reason of his main bid being the lowest, was entitled to be considered the lowest bidder, and the contract was awarded to and accepted by him at the amount of Pierce's said reduced bid or proposal and upon the basis of a restoration of the said 32 items of omissions and changes in the event that sufficient funds should subsequently become available for their restoration. The contract was entered into under date of August 30, 1905, the contract price for the work being $1,037,281.69, and the work to be completed by October 15, 1906.

Copies of the advertisement, specification, proposal, acceptance, articles of agreement, and other papers entering into the contract are annexed to and are by this reference made a part of these findings of fact as Exhibit A hereto.

III.

The contractor in due time commenced and proceeded with the contract work; and additional funds having become available for the work, he was, by letters of October 22 and 31, 1906, directed by the Secretary of the Treasury to restore, or include in the work, the major portion of the said 32 items of omissions and changes referred to in Finding II at a designated increase $200,041.01, and upon an extension of the contract period to June 1, 1907. This order of the Secretary was agreed to by the contractor by the execution by him and his bondsmen of a "Formal consent" agreement thereon
21 on November 16, 1906. Said letters and "Formal consent" are set forth in said Exhibit A to these findings of fact.

No final settlement on the contract has been effected between the contractor and the defendants, the statement of account and final settlement prepared and proffered by the department some time after the acceptance of the work having been protested and refused by the contractor on the ground that it was erroneous and unfair, and the balance therein stated in the contractor's favor far below the amount fairly due him.

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IV.

In the course of the performance of the contract a number of items of extra work and changes were ordered by defendants under and in accordance with the provisions of the contract, and were performed by the contractor, the values or prices of which could not be determined on contract units of value nor agreed upon by the contractor and the defendants. The prices or compensation to be allowed for these items of work were thereupon determined and fixed by the supervising architect. The prices so fixed and paid the contractor for said work amounted to the sum of $23,897.27. The contractor protested that said prices were too low and insisted on much greater compensation for the work. It does not satisfactorily appear from the evidence that said prices were not fair and reasonable compensation for said work.

V.

Certain extra work, including a number of minor changes in the contract plans, was ordered by the architect of the building and was performed by the contractor at extra expense to him without the prior written agreement or direction by the defendants required by the contract for the authorization of extra work. In most of these instances the action of the contractor in proceeding without written agreement or direction was for the purpose of obviating the delay attendant upon securing such agreement or direction, he preferring to take chances on securing compensation for such small items of work rather than chance the delay. Payment for some of this work was recommended by the architect but was refused by the Treasury Department. The performance of this work was fairly worth the sum of $330.35, no part of which has been paid the contractor.

VI.

The contract called for light-cloud Vermont marble for wainscoting of corridors; but as the work progressed it became apparent that a sufficient quantity of this marble could not be procured in time to complete the work within the contract time, and the contractor, upon his own suggestion, was permitted by defendants to substitute Italian marble in its stead, on condition that there should be no extra cost to the defendants on account of such substitution. The increased cost to the contractor on account of this substitution of Italian marble was $12,500, no part of which has been paid by the defendants.

25 VII.

By the terms of the contract the contractor was required to maintain and operate the pumps for draining the subbasement of the building into the city sewer system. When the post-office section of the building was occupied and used during the latter portion

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of the contractor's work the sewage from the toilets of this section of the building was discharged into the sump or drainage tank, from which the drainage of the building was pumped by the contractor. There was no indication in the contractor's drawings or contract that such pumping of sewage would be required, but the drawings of the mechanical equipment contract showed the toilets of the post-office section connected with the drainage sump. When this discharge of sewage into the drainage began the contractor protested against it, both verbally and by letter, on the ground that his contract did not require such pumping. The architect ruled that he must do this pumping, and it was performed by him at a cost of $450. Just prior to the completion of the contract the contractor wrote the architect that he would in due time present a claim for this pumping of sewage, and in reply was informed by the architect that it would be useless for him to do so. A claim was subsequently presented by the contractor, which was disallowed.

VIII.

The work on the ramp for the Bridge Street stairs as originally done by the contractor's subcontractor was poorly executed and was condemned by the architect. The subcontractor then proceeded to get out the work anew, and, finding some difficulty in certain parts of it, suggested a modification, which was approved by the architect, and the extra cost of the performance of which was $325. There was no written agreement or direction by the defendant for this change in the work nor agreement of any kind for extra compensation therefor, and no claim was made for extra compensation on account of it until some time after the work was performed, when a claim for it was made by the contractor. No part of said extra cost has been paid the contractor.

IX.

As originally planned, certain rooms in the building were to have wood-block flooring laid in mastic cement, known as herringbone flooring; but in the 32 items of changes made in order to bring the contract price within the available funds this style of flooring was changed to the ordinary wood flooring to be used in most of the floors of the building, which required a base of concrete in which were embedded the sleepers to which the flooring was nailed. This base for the flooring in said rooms had been put in by the contractor at the time the said 32 items were restored by the supplemental contract or order of October 22, 1906, which called for the herringbone flooring in these particular rooms; and the sum of $1,800 was allowed in the contract price for the restoration of these items to compensate the contractor for tearing out or removing this base of
26 concrete and concrete-embedded sleepers. In the opinion of the contractor this herringbone style of flooring was not a durable kind of flooring; and upon his suggestion to this effect and his recommendation of a steel-woven parquet flooring in pla

of it, the architect requested that he submit a written proposal for so changing the flooring in these rooms, which he did. In this proposal he agreed to substitute the steel-woven flooring without any extra cost to the Government on the basis of its being installed over the concrete and wooden-sleeper base which had already been installed by the contractor. This proposal, after extended negotiations and some slight modifications not material here, was accepted and authorized by defendant in writing; but when the contractor began the laying of these floors the architect discovered that to lay them over this existing concrete and sleeper base would in some instances bring the surface of the floors as much as a half inch above the surface of the floors of the adjoining rooms and corridors, and he thereupon ordered the contractor in writing to tear out the sleepers and concrete and put in a concrete base which would leave the surface of the floors at the proper level.

The contractor contended that the difference in the floor levels could readily be otherwise adjusted, and protested vigorously against said order on the ground that his proposal and agreement to make the change without extra compensation was based upon his not having to remove the existing floor base and put in another base. The architect insisted on his order being observed, and the contractor appealed to the Secretary who finally ruled and notified the contractor in writing that the sleepers should be removed but that the concrete could remain, the spaces that were occupiedo by the sleepers to be filled with concrete. The contractor thereupon followed this ruling, though under protest, and with notice to defendant that he claimed compensation for the cost of removal of the sleepers, etc., which amounted to $207.80. The floors were laid accordingly, the difference in floor levels being mechanically adjusted, and the work was accepted. In the department's proffered final settlement the contractor's claim of $207.80 for extra work in the removal of the sleepers was disallowed, and on the recommendation of the architect, approved by the Supervising Architect, the sum of $1,350 was charged and retained against the contractor on the ground that it would have cost him this sum to have removed the original concrete floor base in said rooms and put in a new base, and that this deduction should therefore be made from the contract price.

X.

The department had under consideration the extra work of waterproofing all the floors of the building; and as an agreement could not be reached with the contractor as to the proper compensation for such work several floors were waterproofed and laid completely by the Government, in order to determine what would be a fair price for the waterproofing. The cost proved to be greater than the department wished to expend for it and the proposition was abandoned. Being unable to secure an agreement with the contractor upon a deduction on account of this work performed by the Government the depart-

ment, in its proffered final settlement on the contract, upon
27 the recommendation of the Supervising Architect charged against the contractor and deducted from the contract price the sum of $500 as being the value of that portion of the work so performed by the Government which would otherwise have necessarily been performed by the contractor as a part of his contract work. It does not satisfactorily appear that the amount so deducted was greater than the value of said work.

XI.

In the marble work installed by the contractor in the rotunda and some other parts of the building there were numerous blocks or pieces of marble which, after this and surrounding work had been finished, were rejected by the architect on the ground that they were not up to the contract requirements in the matter of color and failed to harmonize with contiguous pieces of marble. Written notice of their rejection was given the contractor by the architect, with demand for their replacement with satisfactory marble. The contractor contended the rejected pieces were within the contract requirements, and in many instances refused to remove them, and they were allowed to remain in the building. In the department's proffered final settlement there was charged and retained against the contractor, on the recommendation of the architect, approved by the Supervising Architect, the sum of $3,000 on the ground that said pieces of marble were "of darker color and inferior to sample marble submitted by contractor."

XII.

The specifications provided that "the contractor will be responsible for the proper care and protection of all materials delivered and work performed by him until the completion and acceptance thereof," and that "any and all portions of new work and parts of building work previously completed, if liable to damage by reason of building operations conducted under this contract, must be protected by temporary but substantial boxing or board covering, paper or canvas, which must be maintained in position until not further required and removal is approved by the architect." Protective covering was provided by the contractor, of the character called for by the contract, but not to the extent directed and demanded by the architect, who repeatedly demanded better or additional protection, for the marble work especially. In the department's proffered final settlement, after the completion and acceptance of the work, there was charged and retained against the contractor, on the recommendation of the architect, approved by the supervising architect, the sum of $2,500 "for omission of protective coverings, interior marble work."

XIII.

Above the doors in the corridors of the building were transom lights, with a light of similar size and form on either side of the

ransom light, these side lights being pivoted sash lights. The contractor interpreted the contract to call for double-thicked sheet glass, ot only in the transom lights but also in these pivoted side lights, and proceeded to glaze them all with sheet glass. After some s of this glazing had been done the architect notified the contractor that the contract required plate glass for these side ghts and directed that they should be so glazed. The contractor rotested this requirement and referred it to his glazing subcontractor, who refused to observe it and continued using the sheet glass n said lights until all this glazing was done above the third floor. On the three remaining floors this glazing was done with plate glass, s ordered by the architect. The sheet glass put in these side lights bove the third floor was allowed to remain, but with notice from the rchitect to the contractor that a deduction would be made from the ontract price for the difference in value between the sheet glass used nd the plate glass which the architect claimed was called for by the ontract; and in the department's proffered final settlement there was harged and retained against the contractor on the recommendation f the architect, approved by the Supervising Architect, the sum of $571, held to be the difference in value between sheet glass and plate glass for said lights.

XIV.

The contract called for certain sash-operating devices for subbasement windows to be of bronze. Under written authority from the architect these devices were changed to iron instead of bronze. The parties could not agree upon the amount of reduction in the contract price to be allowed the Government on account of this change, and the amount was thereupon fixed by the architect at $127.03, which reduction was approved by the Supervising Architect and charged and retained against the contractor in the department's proffered final settlement. The reasonable difference in value between the bronze and the iron devices was $108.

XV.

During the time of the performance of the contractor's work a number of prism lights in the walks and cement floors of the courts of the building over the basement were broken. These lights had been put in under the Pierce contract for the superstructure of the building and were of the value of $339.80. In the period during which they were broken there were several other contractors working on the building, and it does not satisfactorily appear by whom they were broken. The architect decided that one-half of this breakage was chargeable to the contractor Robinson; and in the department's proffered final settlement, on the recommendation of the architect, approved by the Supervising Architect, there was charged and retained against the contractor the sum of $169.90, determined by said officers to be one-half of the value of the lights broken.

XVI.

The specifications provided that the varnish should be selected by the architect from among well-known brands, and one or more of such brands approved for use, and that the bidder should allow the sum of $2.57 per gallon for spar varnish and $1.88 per gallon for interior varnish.

The architect selected spar varnish costing $1.90 per gallon and interior varnish costing $1.65 per gallon, and notified the con-
29 tractor that the difference between the cost of the varnish at these prices and what the cost would have been at the prices stated in the specification would be charged against him as a deduction from the contract price. This difference amounted to $154.90 and in the department's proffered final settlement this amount was on the recommendation of the architect, approved by the Supervising Architect, charged and retained against the contractor.

XVII.

The specifications provided that the contractor should supply the architect with such photographs, in duplicate, as might be necessary to show the general condition of the work, each negative to be taken from such point as would best show the condition of the work as directed by the architect, and that there would be required "an average of six 8-inch by 10-inch negatives per month and 20 negatives 5 inches by 7 inches." During the 24 months the contract was under way there could have been required of the contractor a total of 624 photographs. The number supplied by him was 542, 82 less than could have been required of him. On account of this difference, and upon the recommendation of the architect, approved by the Supervising Architect, the sum of $174.85 was charged and retained against the contractor in the department's proffered final settlement. It does not satisfactorily appear that the contractor at any time refused or failed to supply photographs when directed by the architect so to do.

XVIII.

The specifications called for "chair rail in all rooms so noted, but not elsewhere," and provided that "no trim will be required for unassigned rooms except in the subbasement." By written order of the defendant trim was required for three unassigned rooms not in the subbasement, the price for which extra work could not be agreed upon by the parties and was therefore fixed by the Supervising Architect on appraisal. In the appraisal allowance had been made for chair rails in these rooms, but the contractor had no knowledge of this fact when the rooms were being finished, and he therefore finished them without chair rails. The "grounds" for attachment of chair rails should be put in before the walls are plastered. After the walls in these rooms had been plastered and finished the architect demanded of the contractor that he put in such chair rails as

being a part of his work under the appraisal order and compensation for the trim of the rooms. The contractor contended the work was not included in such order and refused to perform it except for additional compensation. Upon the recommendation of the architect, approved by the Supervising Architect, there was charged and retained against the contractor in the department's proffered final settlement the sum of $196 on account of his failure to perform said work.

XIX.

On account of the noncompletion of the contract work within the contract time a portion of the furniture arriving after the time for completion and before the building was ready for its installation was stored elsewhere by the defendant at an expense of $96, the contractor having been given prior written notice by the Secretary of the Treasury that such expenses would be charged against him. Much of the furniture so arriving was, with the assent of the contractor, temporarily stored in some of the rooms and corridors of the building, and the contractor contended that all of it could have been so stored, which, however, the defendant did not wish to do. In the department's proffered final settlement said expense of $96 was upon the recommendation and approval of the architect and Supervising Architect, charged and retained against the contractor.

XX.

By letter of September 30, 1907, the contractor was notified by Assistant Secretary of the Treasury Winthrop that "in accordance with the rights reserved by the Government" in the contract the department would accept the building the next day, October 1, 1907, subject to the contractor's correcting, at the earliest pos-ible date, all defects and omissions which should exist under the terms of the contract at that time, and that such action was not to be construed as relieving the contractor in any way from his full responsibility to complete all items of work embraced in the contract in a satisfactory manner and with the least possible delay. Thereafter the work was treated as accepted by the department, subject to the qualifications expressed in the Assistant Secretary's said letter, as stated above; and the contractor proceeded in the performance of items of unfinished work.

XXI.

The contract called for most of the window sash of the building to be of solid oak, which wood is not especially suited for a damp climate and locality, such as lower New York City, on account of its liability to warp under damp and changing conditions of moisture and temperature.

The contractor, before putting in the windows, called the architect's attention to this fact and suggested a modification of the form

of construction of the sash for the purpose of obviating as much as possible the danger of their warping, which suggestion was not accepted by the architect or department. Owing to the fact above stated, and to the further facts that the materials of some of the sash were not of the best quality, nor thoroughly seasoned, and that the workmanship in their construction and installation was in some instances not of first-class character, there occurred, before the completion of the building and within one year after the issuance of the department's certificate for final settlement, much warping, shrinking, and misfitting in a very large part of these sash, which required extensive repairs of an expensive character. The department demanded of the contractor that he make these repairs, which he refused to do except as extra work for which he should receive extra compensation. To this the department would not agree. Subsequently the contractor repaired a small part of these windows, about 12 in number, but under written protest and notice to the department that it was extra work for which he expected extra compensation. Later he presented a claim of $1,043.69 for this work, which was disallowed by the department.

31 XXII.

In a report of February 7, 1908, to the Supervising Architect, the architect of the building recommended that the department retain from the contract price for the work the sum of $12,000 for the repair of said window sash and of window frames, and the completion and repair of certain other items of work on the building which the contractor had failed to do, any balance remaining over from the work to be paid to the contractor; and upon this report and recommendation the Supervising Architect, in his report and recommendation of March 13, 1908, to the Secretary of the Treasury for final settlement with the contractor, recommended the retention of said sum for the purpose stated. In accordance with these recommendations said sum was, against the contractor's protest, so retained by the department, and against this retained sum there were subsequently charged by the department expenditures, etc., as follows:

1. For repairing said window sash, and also some of said window frames, and for repair and completion of some other work which the contractor had failed to perform, $10,401.45, the greater part of which sum was for sash repairs.

2. For the completion of toilet room No. 122, the sum of $140.

3. For metal reinforcement of certain marble work, previously demanded but not supplied, the sum of $181.20.

4. For services of the architect of the building, the said Cass Gilbert, in superintending the above-noted work, the sum of $1,072.26.

5. Retained by the department, upon the recommendation of said architect, as partial compensation for deficient character of mirror frames and pointing up of certain mason work, the remaining sum of $205.09.

XXIII.

The completion of the contract was delayed 121 days beyond June 1, 1907, the termination of the contract period as extended by the order and supplemental agreement set out in Finding III. Of this delay 12 days were held by defendant to be chargeable to the Government on account of delays in approving and returning the contractor's drawings. The remaining 109 days were held chargeable to the contractor, and liquidated damage therefor at the contract rate of $420 per day, amounting to $45,780, was, against the contractor's protest, charged and retained against him in the department's proffered final settlement on the contract, which sum the defendant still retains.

Of the total delay in the completion of the contract but 61 days' delay was due to the fault of the contractor, the remainder of such delay being due to suspensions and other delays in the work caused by the defendant subsequent to October 22, 1906. The amount of the liquidated damages charged and retained against the contractor by the defendant on account of delay for which the contractor was not responsible, and was therefore not chargeable, was $20,160.

XXIV.

In the department's proffered final settlement on the contract the sum of $5,040 was by defendant found due, and was tendered to, the contractor, which sum the contractor refused to accept on the ground that a much greater sum than this was due him in settlement; and said sum is still unpaid by defendants.

32 *Conclusion of Law.*

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the several sums shown in the findings, as follows: Finding IX, $1,350; Finding XI, $3,000; Finding XII, $2,500; Finding XV, $169.90; Finding XVII, $174.85; Finding XVIII, $196; Finding XIX, $96; Finding XXII, $1,277.35; Finding XXIII, $20,160 and Finding XXIV, $5,040, making a total of $33,964.10.

It is therefore adjudged and ordered by the court that the plaintiff have and recover of and from the United States the said sum of thirty-three thousand nine hundred and sixty-four dollars and ten cents ($33,964.10).

The petition as to all other items is dismissed.

Opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The plaintiff contracted to do certain interior work in the New York post office building. The amount involved, including additions to the work and increases in amounts, was largely in excess of $1,000,000. Other parts of the work incident to a completion of the

building were done by other contractors, and all bidders in the work or parts thereof were cautioned by the specifications that there might be "some hindrances and delay" incident to the performance of work in the building by various contractors at the same time. The time for completing the entire work undertaken by plaintiff was fixed by the specifications upon which its bid was based to be on or before July 15, 1906. It was not completed at that time, and in October following a supplemental contract extended the time within which the plaintiff should perform to June 1, 1907. It was not until October of 1907 that the building was accepted by the Government so far as plaintiff's work was concerned, and when finally taken possession of there were some minor matters which the architect claimed were not completed.

The building was a large one, the plans for it were elaborate and the details of construction were almost innumerable. A number of different contractors were engaged upon different parts of it. There were suspensions of the work and alterations in parts of it. That these things would occur were well within the contemplation of all parties who undertook the work, as well as of the Government's representatives.

The plaintiff's petition claims a number of items, and the findings of fact are extended so as to embrace the contentions of the parties. We think it unnecessary to discuss each of the items, because the facts found sufficiently show the proper conclusion deducible and deduced therefrom. There are two main questions of contention, one by the plaintiff upon the question of liquidated damages, and the other upon the question of a deduction on account of certain repair work.

The contract contains a clause providing for liquidated damages to be paid by the contractor in case he fails to perform within contract time. The act of 1902, 32 Stat. 326, requires that clause in contracts such as this.

33 The work was not completed or accepted until October, 1907, or 121 days after the stipulated time in the supplemental contract, namely, June 1, 1907. In the attempted adjustment of that matter as made by the Treasury Department, and of which the contractor complains, he was charged with 109 days' delay, the remaining 12 days having been deducted from the total because of delay by the Government in furnishing "certain drawings." The act of 1902 mentioned in the specifications empowers the Secretary of the Treasury to remit the whole or any part of the liquidated damages as in his discretion may be just and equitable. This act, being in existence when the plaintiff's contract was made, must be read into the contract itself. In determining whether anything would be remitted the Secretary did not feel bound by the contract provision relative to the ascertainment of a cause of delay by the supervising architect, but appointed a board to investigate the facts and report to him with their recommendation as to whether any waiver of the liquidated damages should be made by him.

While it is argued with much force by the Government that this action of the Secretary is conclusive on the parties, we think the

better view is against that contention when all the terms of the contract are considered. It provided that the Government could suspend the work in whole or in part, and that for "all such suspensions" and other delays caused by the Government an allowance should be made to the contractor, and it also provided that no claim for damages should be made by, or allowed to, the contractor for any damages arising out of delays caused by the Government. This latter provision is valid and enforceable against the contractor, Wells Bros. Co. Case, 254 U. S. 83, 87 (54 C. Cls., 206), but the former provision requires that some account be taken of the "suspensions" in ascertaining what, if any, additional days' time should be allowed the contractor. It is not every suspension of part of the work that will give the contractor additional time, but it must have been such a suspension of part that has operated to delay the whole work. If there were a suspension of a part that had no effect on the balance of the work, or where the contractor could proceed with other of the work unhindered by the particular suspension, it could not be said to have delayed the ultimate performance of the whole so as to entitle him to additional time. We are not concerned with suspensions prior to the supplemental contract of October, 1906, because that contract extended the time of performance and took account of delays to that time, but if a suspension made prior to the October contract on part of the work was not lifted until after that date, and if such continued suspension of part so affected the whole of the work as to delay its completion within the contract time, then that suspension becomes material. And an instance of that kind happened. In August, 1906, an order directed the suspension of certain work, including marblework on the Bridge Street stairway No. 116, and the order to resume work was not issued until the end of March following—more than six months. The architect himself states that the contractor was delayed by these items and would doubtless claim exemption upon them, but also concluded that the primary cause of the delay was the contractor's refusal to submit a reasonable bid for certain work. We take a different view of this matter and
34 hold that inasmuch as the department could have fixed the price it need not have waited upon the contractor's bid, and in fact did not so wait, and that the suspension made in August and continued until nearly April did operate to delay completion of the work, which according to the supplemental contract was due to be completed by June 1. As nearly as December, and several times thereafter, the contractor had called on the department to be allowed to proceed with incidents connected with this particular work. We have not found that a period equal to the entire time of the suspension should be added to the time the contractor had within which to complete, but that a portion of it should be so added. Similarly, on account of other suspensions the contractor should have additional time. The extension of one day for each day's delay in the performance of the entire work caused by suspensions at divers times of parts of the work has been found in finding XXIII.

The contention by the plaintiff that he is not chargeable with any

liquidated damages can not be sustained. The case of United Engineering Co., 234 U. S. 241, is not applicable to the instant case. The contract provides a definite period from which the liquidated damages are to be computed, and in case of delays by the Government or suspensions, in the circumstances stated above, it is provided that one day be added to the contractor's time for each day of delay. These delays being ascertained, the time of completion is as definitely fixed as if written in the contract itself. The theory that the entire liquidated clause is defeated by a provision intended to protect and save it, and at the same time to accord to the contractor some relief, is not to be adopted where the contract shows plainly that its intent is to furnish the means of definitely ascertaining the period during which the contractor should be charged with the agreed damages. There is no question here of an apportionment of delays. The contract itself requires that under certain stated conditions additional days shall be given in which the contractor may perform, and it is the duty of the court to give effect to this provision. We have therefore ascertained the number of days which should be added to the contract period from June 1 and extended the time accordingly, as contemplated by the clause under consideration.

The other question involves the withholding by the Government of $12,000, mentioned or referred to in Findings XXI and XXII.

In the contract the contractor undertook to guarantee the condition of the work for one year after acceptance. The sum mentioned was retained to pay for repair work which the contractor was called upon to do. It is true that the contractor suggested that a modification be made in the specification of certain material, and called attention to the fact that this material was not well suited to the climatic conditions, but nevertheless the provision to which he assented was incorporated in and made a part of the contract, and was to the effect that the condition was guaranteed for a definite period. It is too late, after contracting to do the repairs, to interpose the objection that the material (as in this case solid oak) was liable to warp. If it was not his purpose to guarantee the condition when oak was used the contract should not have said what it does say. If it be assumed that his judgment about the material to be used was better than that of the architect, it is yet true that he under-
35 took to do the work, and guaranteed its condition with the material the architect had specified, and having failed and refused to do the repairs, the Government was within its rights when it caused them to be done at his expense. We think, however, that the contractor is not chargeable with the item of $1,072.26 for the architect's services, nor for the other item of $205.09, this latter not definitely appearing to be for repair work which the contractor was obligated to do. The sum of these two items the contractor should recover, and he should recover the further sums shown in the court's conclusion. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

36 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Fifth day of December, A. D., 1921, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the plaintiff, and do order, adjudge and decree that Roy H. Robinson, administrator of the estate of John C. Robinson, deceased, is entitled to recover and shall have and recover of and from the United States the sum of Thirty-three thousand nine hundred and sixty-four dollars and ten cents ($33,964.10).

By THE COURT.

VII. *Proceedings After Entry of Judgment.*

On January 10, 1922, on motion made therefor, Charles H. Merillat, Esq., was substituted as attorney of record, on suggestion of the death of James K. Jones, Esq., former attorney.

VIII. *Plaintiff's Application for Appeal.*

Now comes the claimant this 3d day of March 1922 and makes application for allowance of an appeal and notes an appeal herein to the Supreme Court of the United States, in accordance with the provision contained therefor in the Act of Congress relating thereto.

CHARLES H. MERILLAT,
Attorney for Claimant.

Filed March 3, 1922.

Ordered: That the above appeal be allowed as prayed for.
March 13, 1922.

By THE COURT.

37 Court of Claims.

No. 30800.

JOHN C. ROBINSON

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law; of the opinion of the Court by Campbell, Ch. J.; of the judgment of the Court; of the claimant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 21st day of March, A. D. 1922.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

38 In the Court of Claims of the United States.

No. 30800.

ROY H. ROBINSON, Administrator of the Estate of John C. Robinson, Deceased,

v.

THE UNITED STATES OF AMERICA.

Stipulation.

It is hereby stipulated by counsel for the parties to the above entitled cause, in accordance with Rule 8, paragraph 1, of the Rules of the Supreme Court of the United States that the Clerk of the Court of Claims in preparing the transcript of the record on said appeal to the Supreme Court of the United States herein, shall omit from such transcript of record the original contract and supplementary papers relating thereto, all except those parts indicated by pencil memoranda as to be included in said transcript, said pencil memoranda appearing on the following pages of Claimant's Exhibit AA:

Page 21; title of the Court, of the case and its number, of exhibit, the date filed, title 'Appendix,' title "Proposal, etc.";

Page 25, Clause "Modifications";

39 Page; conclusion of clause "Modifications" and clause "Delays";

Pages 30-31; Clause "Time to complete";

Page 33; Clause "General Authority of Architects";

Pages 34-35; Clause "Definition of term used";

Pages 36-37; Clause "Inspection";

Pages 38-39; Clause "Protection of work and material";

Pages 45-46; Clause "Pumping";

Pages 47-50, Clauses "Photographs," "Extras," "Damage," "Final acceptance" and "Guarantee";

Page 95; Clause "Repairs";

Pages 122-126; Heading "Interior Marble and Slate Work" including all clauses to but not including clause "Finish of Exposed Surfaces of Marble";

Page 153; Clause "Window Frames and Sash" and the first sentence of clause "Frames";

Pages 156-157; Clause "Sash for Outside Windows" heading to be included followed by stars to paragraph beginning "Exterior sash

in Casement" which is to be printed to end of clause; and clause "Interior Frames and Sash" down to but not including paragraph beginning "All cutting and fitting around pipes."

Pages 159-160; Clause "Door Frames and Doors" down to but not including paragraph beginning "In attic, or roof space";

Page 161; paragraph beginning "Doors to the watercloset stalls";

Pages 180-181, Clause "Varnish";

Pages 187-188, heading "Glazing," including all clauses down to, but not including clause "Obscured Glass, Double Thick A. A."

40 & 41 Pages 270-279; "Proposal" entire to and including signature and address p. 279;

Pages 292-298; "Treasury Department Telegram" to and including signature and title p. 298;

Pages 300-310; "Contract" to and including signature "Jno. L. McKenna" p. 310;

Pages 314-316 "Treasury Department" to and including signature and title, p. 316;

Pages 318-322 "Formal Consent" to and including signature of Louis A. H. Heaviside p. 322.

It is further stipulated by counsel for the parties that all omissions from the Exhibit shall be shown by stars.

It is further stipulated by counsel for the parties that the United States may, at any time prior to the hearing of the case, cause to be added to the record on appeal, to be printed at the expense of the appellant, such additional parts, if any, omitted from the record as it may deem necessary.

CHAS. H. MERILLAT,
CHARLES J. KAPPLER,
Counsel for Appellant.
ROBERT H. LOVETT,
Assistant Attorney General.

42 [Endorsed:] Carbon. Court of Claims. No. 30800. Roy H. Robinson, Administrator of the Estate of John C. Robinson, deceased, vs. The United States. Defendants' Stipulation. Alexander H. McCormick, Assistant Attorney. A. H. McC.—E. J. B.

43 Court of Claims.

No. 30800.

Roy H. Robinson, Administrator of the Estate of John C. Robinson, Deceased,

vs.

The United States.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the annexed is a true copy of Exhibit "A" to the Findings of

Fact, filed December 5, 1921, and referred to in Finding II, p. 2 in the record on appeal in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 21st day of March A. D. 1922.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

21-24 In the Court of Claims.

No. 30800.

ROBINSON

vs.

U. S.

CLAIMANT'S EXHIBITS AA.

[Filed September 22, 1917.]

Appendix.

Proposal for Interior Finish of the U. S. Custom House, New York, N. Y.

* * * * * * *

25 Modifications:

The Department reserves the right to make any additions to, omissions from or changes in the work or material called for by the drawings and specification, without notice to the surety or sureties on the bond given to secure satisfactory compliance with the terms of the contract; and the Department further reserves the right to demand additional security when additions are made, if, in its judgment, such security is required. The unit prices called for in the proposal sheet shall be used as the basis of value of such additions, omissions or changes, if they are deemed reasonable by the Supervising Architect. If deemed unreasonable or if none applicable are given, and no agreement can be reached by the Supervising Architect and the contractor as to the reasonable value of the work, then the Supervising Architect shall have the right to fix
26-29 the value of such additions, omissions or changes, and no claim for damages on account of such change or for anticipated profits shall be allowed.

* * * * * * *

Delays:

Each bidder must submit his proposal with the distinct understanding that, in case of its acceptance, time for the completion of the work shall be considered as of the essence of the contract, and that for the cost of all extra inspection ,and for all amounts paid for rents, salaries of contingent force, and other expenses entailed upon the Government by delay in completing the contract, the United States shall be entitled to the fixed sum of Four hundred and twenty Dollars ($420.00) as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States. Provided, however, that the collection of said sum may, in the discretion of the Secretary, be waived in whole or in part; and that the contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government.

The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract, whenever, in its opinion, it would be inexpedient to carry on said work.

* * * * * * *

30 Time to Complete:

Work must begin shortly after the contract is signed, and the entire work must be completed on or before July 15, 1906. The bidder will consider this as an essential item in preparation of his bid.

Bidders must also understand that in the performance of work in the building by various contractors at the same time, some
31 & 32 hindrance and delay in execution of certain plans for progress will be probable and allowance be made therefor.

Time is held to be an essential consideration of this contract, and it is hereby particularly required and provided that this work as a whole, and any and all parts of the same shall progress at all times with a proper and sufficient force of workmen and an ample supply of materials, and the work shall be conducted and managed in a manner satisfactory to the Architect, and which, in the opinion of the Architect and the Supervising Architect, shall insure its completion within the time stipulated.

The contractor will be strictly held to compliance with the above provisions.

* * * * * * *

33 General Authority of Architects:

By virtue of the provisions of an existing contract, Cass Gilbert is the Architect of the U. S. Custom House, New York, N. Y. Building, has authority for the preparation of drawings and specifications therefor, and for the supervision of its construction; and is invested

with the customary authority of an architect, except as limited by the regulations of the Department.

The said Cass Gilbert, either personally, or by duly authorized representative, shall have the power and authority to inspect, examine, and approve or reject materials, methods and workmanship furnished or used under this contract, and to direct the conduct, management and progress of the work and any or all parts of the same, with the exception, that orders involving modifications in the provisions of the contract or in drawings, letters or specifications forming a part thereof, shall be subject to and require the written approval of the Secretary of the Treasury.

* * * * * * *

34 Definition of Term Used:

The word "Similar" when used in drawings or specifications shall not be considered as meaning, "identical," but items in each case to be separately worked out to suit conditions in a manner like or similar to the example referred to.

The Architect shall be the judge as to what constituted a "reasonable notice" to Contractor, whether or not workmanship or materials supplied are "suitable," "proper," "satisfactory," "approved,"
35 "necessary," "equal to" or in condition described by words of similar intent.

* * * * * * *

36 Inspection:

Each bidder must understand that, should his proposal be accepted, the materials delivered and the work performed by him at any and all times during the progress of the work, shall be subject to the inspection of the Architect or his authorized representative, with the right to accept or reject any part thereof, that, in the opinion of the said Architect or his authorized representative, is not in accordance with the drawings and specifications; and that he must, at his own expense, within a reasonable time to be specified by the Architect, remedy any defective or unsatisfactory material or work, and in the event of his failure to do so, after eight days' notice, the Department shall have the right to have the same done and to charge the cost thereof to the Contractor's account.

Any work disturbed or injured incident to removal of rejected materials or workmanship, must be made good at the Contractor's expense; or the Department may retain or shall receive from
37 the Contractor the difference in value between the work performed and that called for by the specifications, or shown by the drawings, it being optional with the Department to pursue either course.

Condemned or rejected materials must be removed from the premises immediately upon receipt of notice from the Architect, and must not be returned to the works at any subsequent time.

* * * * * * *

38 Protection of Work and Material:

The contractor will be responsible for the proper care and protection of all materials delivered and work performed by him until the completion and acceptance thereof, and the final payment for all the work embraced in his proposal.

If at any time during the progress of the work any part of the same shall be liable to damage from freezing weather, such effective protection as may be deemed necessary by the Architect must be provided by the contractor without charge to the Government.

39-44 Any and all portions of new work and parts to building work previously completed, if liable to damage by reason of building operations conducted under this contract, must be protected by temporary but substantial boxing or board covering, paper or canvas, which must be maintained in position until not further required and removal is approved by the Architect, when such casings are to be removed from such portions of the building. At completion and acceptance of the work, all casings and debris are to be removed from the premises, leaving same clean, uninjured and ready for use.

The Contractors for "Mechanical Equipment" and for "Elevators," are subject to similar requirements relating to protection of their own work, and are subject to responsibility for damage caused the work of other contractors.

* * * * * * *

45 Pumping:

The Contractor shall use the centrifugal pumps now set in the sub-basement, if found available, to keep the sub-basement pumped free of water, paying all cost of current used, and maintain-

46 ing pumps, auxiliaries and connections in good order.

Should pumps or apparatus be or become disabled, provide an effective substitute.

The pumping shall also include any necessary pumping of the under drainage system through the large sump shafts, from June 15, 1905, until the completion of this contract.

If water is permitted to discharge into the sub-basement by other contractors, during such time, this Contractor may, at his own risk, collect from such other contractor a reasonable charge for expense caused thereby, but settlement must be made between contractors and is not guaranteed by the Government.

At about the time of completion, the electric pumps and switchboard are to be taken out, one at a time, and be rebuilt, re-fitted or repaired by the manufacturers, or by shops equally satisfactory to the Architect, as may be necessary to put them in perfect condition, equal to new. Any defective or worn parts to be replaced with new, and pumping system and connections be left in perfect order at completion, satisfactory to the Architect. * * *

47 Photographs:

The contractor is to obtain and pay for such photographs
48 as may be necessary to show the general condition of the work, and is to furnish cloth mounted bromide prints of each view, in duplicate, to the Architect, for filing, also all negatives.

Each negative shall be numbered and dated, and shall be taken from such points as will best show the condition of the work, as directed by the Architect. There will be required an average of six (6) 8″ x 10″ negatives per month and twenty (20) negatives 5″ x 7″. They are to be skillfully executed by a photographer whom the Architect shall approve.

These photographs shall be evidence of the condition of the work at date when taken.

Extras:

No additional compensation shall be due the Contractor for the performance of any work or furnishing of any material whatever, except in accordance with the written agreement or by written order from or approved by the Secretary of the Treasury, as provided under paragraph headed "Modifications."

Damage:

The Contractor shall be responsible for all damage to any
49 person or persons or any property, caused or alleged to have been caused by or incidental to the execution of this work, and must defend all suits or claims arising from or incident to the execution of work under this contract, without expense or annoyance to the Architect, or to the officers or agents of the Treasury Department.

Should the Contractor or his workmen or material cause damage to the work or material of other contractors or persons, the same shall be repaired or replaced by the person originally furnishing it (or such competent party as the Architect may approve), the repairs and replacing to be under the direction of the Architect, and the cost therefor shall be paid by the Contractor causing the damage.

Final Acceptance:

It is required that all work included under this contract must be delivered in good condition at the time of completion and delivery of the building to the Government, and no reason or excuse for failure to so deliver it, other than the acts or orders of the Department or its representatives, will be valid. Previous acceptance, alleged approval or failure to object to conditions or methods shall not constitute a justification for defects, if any, which may appear at delivery.

Guarantee:

The Contractor is required to guarantee and maintain the stability and satisfactory condition of all material and work furnished under

this contract, and keep same in perfect condition for one year after the issuance of the final certificate, except as otherwise specified, stipulated or specifically set forth in the contract.

50-94 Attention is called to other special guarantees for a longer period as hereafter required.

Original defects, or defects, breakage or deterioration resulting from reasonable and customary use or wear of materials furnished, when used for the purpose intended in a usual and proper manner, which may appear within one year, must be made good by the Contractor, at his own expense, whenever called upon to do so by the Secretary of the Treasury. Such repairs are to be executed under the direction of the Architect, and to his satisfaction, it being required that all work is to be in perfect condition when such period of one year shall have elapsed, with the following exceptions:

This guarantee shall not apply to injuries occurring after final acceptance and due to malicious action of parties not properly under Contractor's control, to violence, abuse or legally proved carelessness or misuse of other contractors or their employees, or of the employees or agents of the Treasury Department. * * *

95-121 Repairs:

Repair breakage before plastering is begun, leaving all in good condition. Repair damage done in setting metal furring and leave whole. Repair around vent openings, rotunda roof.

Should it be necessary to take up existing floor construction in order to set marble or other work furnished under this contract, such work to be done and necessary repairs to be made by this Contractor. * * *

122 Interior Marble and Slate Work.

Marble work is shown on most of the drawings for interior finish to some extent, and all should be carefully examined for marble.

In certain drawings for Grand Staircases, Rotunda, Main Hall and Vestibules, nearly all the marble work is shown, the parts not drawn out being substantially a duplicate or reverse of parts drawn out. In toilet room drawings the marble work is mostly indicated for the different rooms. Should parts be lacking the general type of finish to be extended all around such rooms to make same complete. In other drawings, the marble finish shown is mostly typical and is intended to apply to extensive areas similar in character and general treatment to parts illustrated.

123 The bidder must understand that in parts covered by typical drawings, all portions of corridors, passages, halls or rooms in stories so typified, are to be finished in a manner similar to the portion drawn out, and be made complete.

Measurements are to be taken at the building, and marble must be arranged as to jointing, thickness, sizes, fitting, anchoring and connections, in a manner similar to indications on typical drawings, fitting the structural dimensions and filling other requirements for

each special portion of the work, in a manner satisfactory to the Architect.

If in any case the typical drawings shall not apply, the special conditions shall be met and forms and methods of disposing of materials shall be arranged in accordance with the instructions of the Architect the intent of general requirements as to finish of such portions being followed.

Marble work for Post Office portion is to be done in advance of other work, as elsewhere specified.

Kinds of Marble:

Various kinds of marble are designated by letters upon the drawings, the following key of which is hereby given.

In cases where a particular kind is noted by name on the drawings or in the specifications, such is to be furnished without reference to the letters. If in any case parts are not definitely marked, the marble to be of kind corresponding with kind of finish in other similar locations in the building.

"A" Numidian Breche Sanguine.
"B" Siena Bright Yellow (Not Old Convent).
"C" Cippolino, strongly veined.
124 "D" Numidian Paonazzo.
"E" Hauteville.
"F" American Green, Easton, Pa.
"G" Italian light veined white.
"H" Blanco P Italian.
"J" Georgia, white or light veined.
"K" Vermont white, lightly veined with black (not green or blue).
"L" South Dover white, light veined or clouded in parts.
"M" Breche Violette, selected for color and figure.
"N" Fluer de pache.
"P" American Maryland or Spokane, strong green and white veining.
"R" Knoxville, grey.
"S" Rutland white, veined with green.

Grades and Coloring:

The quality of marble for all portions of the work to be the best grade or quality produced by quarries, excepting as otherwise described or as otherwise represented by standard samples. Two or more samples each, of each kind of marble (except kinds not subject to alternatives) about 2 ft. square and 1" thick shall be submitted to show the extremes and average of coloring and maximum of natural defects in best grades in such marbles, finished in the manner specified, and must be such as shall be satisfactory to the Architect.

The better grades of marbles to be used will be selected by the Architect, for color and veining, from stock available in the yards of Contractor or in the market, and marble furnished to be from blocks so selected, sawed and finished as directed.

125 The kinds of marble of the better grades may be changed at time of selection by order of the Architect, for the improvement of the color scheme, provided no modification in cost of stock in the block be so involved.

Adjoining pieces of marble in floors, slabs, or ashlar, are to be selected for coloring and veining, to avoid strong contrasts. Pieces cut from the same block opened out are to be used adjoining where practicable, matched as to veining, although some waste may be occasioned thereby.

Alternative Marbles:

Marbles A-B-C-D-E-G-H-M-N and R will not be subject to alternative bids.

Marbles listed as F-J-K-L-P and S illustrate the general type and color of marbles desired in places so marked, and alternative bids may be presented for substitutes.

Bidders are expected to submit figures for all marbles listed, but may present alternative bids for marbles listed as subject to alternatives, based upon the use of other marbles as substitutes therefor if suitable as to color and texture, provided a sufficient quantity of such kinds can and will be obtained, in necessary sizes, of quality specified, and within the time required.

Alternative bids are not wanted unless the above requirements are met.

All terms and conditions of alternative proposals should be clearly stated on proposal sheet, and kind of marble proposed to be furnished as alternative must be shown by three finished samples about 2 feet square each, and about an inch thick, showing respectively the lightest, average, and darkest shades of marbles proposed to be furnished with a representation of average color and veining. Should

126–152 it be desired to accept any alternative or part of same, the bidder must first demonstrate to the satisfaction of the Architect and without expense to him, that all conditions of an alternative proposal can, will be, or are fulfilled in such case. * * *

153–155 Window Frames and Sash:

The character, sizes and general type of exterior window frames and sash are given on drawings Nos. 441-442 and 443. The sizes of material to be as detailed. All exposed surfaces to be hand-dressed to remove machine marks.

Stops will be put on with round head screws, and window stop washers of bronze, of an approved make and finish furnished under hardware.

Frames:

All materials to be well seasoned and kiln dried, free from rot or unsoundness, shakes or checks in any part; and from pitch streaks, blue sap, unsound knots or any knots larger than ¼" diameter on parts exposed after erection. * * *

156 Sash for Outside Windows: * * *

Exterior sash in basement and sub-basement windows to be white pine. All other sash to be of oak, glazed generally with plate glass, as elsewhere specified, with exceptions noted. See "Glazing."

Straight grained wood to be used in all sash.

A few sash will have special lower rail, fitted with small registers, which will be furnished by another Contractor; but the setting of the same in approved manner will be done as a part of this contract.

157–158 Interior Frames and Sash:

Interior window frames, are to be constructed generally as per typical details. Any portion not definitely covered to be of section and construction similar to others of same general kind. Wood of interior window frames to be solid oak, except as specified otherwise.

Frames for sub-basement, except metal covered frames, but including ceiling lights under vault lights in bottom of areas where shown, to be ash for painting. Frames in basement, except corridors, toilet and Post Office, will also be of ash for painting. The ash may be of any color, but must be sound and free from worm holes, rot or other similar defects. Sound small knots are not objectionable. Sash in attic space to be pine, or cypress.

Frames for first and second stories, unless otherwise noted, and for Naval Officer's Private Room in third story, will be of quartered white oak. Elsewhere, including corridors, toilets and P. O. space mentioned above, frames and sash will be of plain white oak, including corridor side of sash and frames in 3rd story and above.

Frames are to be secured to the furring block on the bucking by screwing under the stops behind sash, or by countersunk head screws in bored sockets, capped with wood glued in to match the frame. In openings without bucking, frames to be nailed to wood grounds or to porous T. C. blocks. * * *

159 Door Frames and Doors:

The main entrance door and vestibule door frame, second story, and both entrance doors and frames on Bowling Green, First story, will be of bronze, as specified elsewhere. Other exterior frames and all interior frames whether with or without doors, shall be provided, except where details show openings of stone or marble without doors, in which case no door frame need be supplied.

In sub-basement, the

Doors and frames other than kalemeined, will be ash to paint.

In basement, the doors and frames in corridors, toilets, and

160 Post Office space will be plain oak. Other doors and frames of ash, to paint. Frames made from 2″ thick stock.

In first and second stories, inter-communicating doors and frames in rooms Nos. 137 to 144 inclusive, to be plain oak. Collector's suite is separately specified. All other doors and frames to be quartered oak.

In third to seventh floors, inclusive, corridor side of doors and their frames to be quartered oak. Inner side of doors and frames in room No. 321 to be quartered oak. All other doors and frames to be plain oak. * * *

161–179 * * * to the water-closet stalls throughout shall be of oak 1¼" thick, with 4" top rails and stiles, and 6" bottom and center rails, with plain panels. * * *

180 Varnish:

The varnish to be used for finishing woodwork in the building (not including "special finish and decorations") will be selected by the Architect from among well known brands, and one or more of such brands will be approved for use. Bidder will allow the sum of $2.57 per gallon for spar varnish, and $1.88 per gallon (cash in 10 days) for interior varnish, delivered in New York in 5 gallon cans. Certified copies of invoices of all varnish used must be furnished to the Architect, and none but the approved material may be delivered or used in the building.

Samples:

Sample boards, in duplicate, approximately six feet long and eight inches wide are to be prepared, showing the finish of oak trim.

Sample boards are to show approximately one foot in length of each different coat, the coats lapping back from one end so as to leave exposed one foot of the finished surface of each coat, the remainder of the sample showing the completed surface.

The samples shall be prepared after consultation with the Architect and in accordance with his directions, and to be made 181–186 satisfactory to him. After approval, the samples shall be used as a standard to be followed in all work so represented. * * *

187 Glazing.

All windows, sash, sash doors, glass doors, and openings for glass in the building, both exterior and interior, with exceptions named, are to be glazed by this Contractor.

Skylight roofs and monitors are under contract or otherwise provided for and will not be included in this portion of the work.

Glass to be first quality of kind described, free from bubbles, scratches or wavy surfaces.

Double Thick A. A. Clear Sheet Glass:

Will be used in windows in outer area walls, under sidewalk, in all except north side of building.

For all interior transoms and fixed sash in partitions, and for P. O. screen.

Polished Plate Glass:

Will be used for all exterior windows, sash, doors, transoms and side lights in the building, except as above specified, to have D. T. A. A. glass.

For glazed entrance doors, all vestibule doors, side lights and transoms and vestibule partitions at 2nd floor, north entrance, and for all glass in Cashier's screen, and for glass shelves wherever noted.

188–269 For all sash or doors in the building not otherwise specified. In lights in which the sum of the two dimensions is 62 inches or more, the glass must be ¼" or more in thickness in all parts of same. Where the sum of the two dimensions is less than 62 inches, the glass may be not thinner than 3/16" in all parts.

Glass to be ground one side for all exterior toilet windows, except that upper sash in court toilet rooms, 6th and 7th floors, will be of clear glass.

Obscured Glass, Plate:

Stipples, double process, one side, polished the other side, ¼" or more thick, like sample in Architect's office, to be furnished for all interior glazed doors, except vestibule doors, and for side lights and transoms between corridor and rooms on Bowling Green—1st story. To be ground on one side and stippled the other side for toilet room doors. * * *

270 *Proposal for the Interior Finish U. S. Custom House, New York, N. Y., Building.*

Cass Gilbert, Architect,

79 Wall Street,

New York.

N. B.—After this proposal sheet is filled out it must not be forwarded under frank, but must be detached and forwarded under separate cover, with postage prepaid by the bidder.

1905.

Chicago, Illinois, May 6, 1905.

To the Supervising Architect,
Treasury Department,
Washington, D. C.

SIR:

I herewith propose to furnish all labor and materials required for and included in the work of the Interior Finish of the U. S.
271 Custom House, New York, N. Y., Building, as shown on drawings numbered consecutively from 201 to 210 inclusive, 400 to 446 inclusive, 628 to 638 inclusive, also #400-A, the specification, details to be furnished, and in accordance with the explana-

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tory directions of the Architect or his duly authorized representative, and to the satisfaction of the Supervising Architect, for the sum of one million three hundred sixty-four thousand, three hundred fifty-eight dollars ($1,364,358.00), and will agree to complete the entire work on or before July 15, 1906, provided the contract and bond be approved by the Secretary of the Treasury, within 10 days of submission by the undersigned, of a properly executed contract and bond with approved sureties in amount required by the specification, and not later than May 20, 1905, unless delay beyond such date should be caused by or result from the acts or default of the undersigned.

For reference in preparing monthly estimates for payment, and in determining values of modifications desired, the following subdivisions of the total contract price is made, including in each item its proper proportion of expense and profit. The prices per unit of quantity for work in place, stated under each item, are hereby declared to be a fair market valuation thereof, and may be used by the Architect or Supervising Architect in computations for the purposes above stated if they shall find same to be reasonable, otherwise unit values to be determined as provided in the specification under the head of "Modifications."

Included in proposal for work specified under the general headings of—

272	General conditions	(	$17,171.00)
	Items of Temporary Utility	(	$6,619.00)
	For temporary damp-proofing of floors, as specified $1,650.00		
	Cement, Concrete and Mortar	(	$82,571.00)
	Price for #1 Concrete, per cubic foot $25 cents.		
	Price for #2 Concrete, per cubic foot $23 cents.		
	Price for #3 Concrete, per cubic foot $22 cents.		
	Cement tiles, per sq. (100 square feet) $30.00		
	Brick work, common	(	$34,446.00)
	Common brick per cu. ft. including mortar $50 cents.		
	Fire-proofing and Floor Construction	(	$93,000.00)
	Per sq. ft. for T. C. column covering with filling $16 cents.		
	Per sq. ft. for T.C. wall furring, net areas $10 cents.		
	Per sq. ft. for 4" T.C. partitions, net areas $13.9 cents.		
	Per sq. ft. for double 3" T.C. partitions, net areas $27 cents.		
	Timbrel Arch Work	(	$7,200.00)
	Water Proofing	(	$850.00)
	Plastering	(	$95,655.00)

273	Per sq. yd. or 1 coat work on T.C. or brick, net areas	($25 cents.	
	Per sq. yd. or 2 coat work on T.C. or brick, net areas	($40 cents.	
	Per sq. yd. for 3 coat work on lath—net areas	($58 cents.	
	Per sq. ft. of moulded cornice, measuring girth of mouldings (ornament extra), not including rooms 218-219	($12 cents.	
	For ornamental moulding 4" girth, per lin. ft.	($8 cents.	
Enameled brick and tile work			($15,729.00)
	Per sq. ft. for thin tile wainscot	($65 cents.	
	Per sq. ft. for ceramic tile floor	($15 cents.	
Interior marble and slate work			($505,000.00)
		Alternate	($464,000.00)
Using kinds of marbles scheduled. Alternatives given elsewhere.		"	($450,000.00)
	Par sq. ft. marble treads and platforms, other than grand staircase	($1.10	
274	Per sq. ft. for slate treads and platforms	($.95	
	Per sq. ft. for floors of tiles 12" x 24"	($.64	
	Per sq. ft. for floors of tiles 10" x 20"	($.64	
	Per sq. ft. for floors of tiles 10" x 10" or 8" x 16"	($.64	
	Per sq. ft. for terrazzo floor and mosaic border	($.48	
	Per lineal ft. for threshold	($1.40	
	Per sq. ft. of "L" marble wainscot slabs	($.87	
	Per lineal ft. of marble wainscot 6' 6" high, as shown on drawing 432	($7.00	
	Per lineal ft. of marble wainscot 8' 6½" high, as shown on drawing 427	($9.00	
	Per sq. ft. of door trims as shown on drawings 427 and 432	($1.75	
	Per lin. ft. for 1" x 10" plain marble base—basement	($.85	
275	Per sq. ft. for W. C. & Urinal partitions, exclusive of metal trimmings	($1.15	
Granite work			($1,464.00)
Special finish and decoration			($85,000.00)

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Window and door openings, see "Trim"	(	$.....	)
Per sq. ft. of openings—for copper covered frames and sash—excluding glass	(	$.59	
Per sq. ft. for interior Kalemeined frames, sash and doors—excluding glass	(	$.56	
Price for corridor with frame, transom and trim complete, as per drawing 432, with glass and hardware, varnished (not including register)	(	$61.69	
Price per corridor door with frame and trim complete, as per drawing 427, with glass and hardware, varnished, (not including register)	(	$49.20	
Price for intercommunicating door, with frame and trim 2 sides complete, with hardware, varnished	(	$23.09	
276 Trim, including "Windows and Door openings"	(		$87,021.00)
Per lin. foot for wood base, varnished	(	$.16	
Per lin. ft. for picture mouldings, varnished	(	$.06	
Per lin. ft. for chair rail, varnished	(	$.10	
Wood Floors	(		$30,268.00)
Per sq. ft. for Georgia pine floor stained, with paper and stripping	(	$.12	
Per sq. ft. for 1⅛" thick D. & M. maple floor—oiled, with paper and stripping (including underflooring and sleepers)	(	$.39	
Per sq. ft. for wood block floor finished not including concrete bed; but including mastic	(	$.45	
Painting and varnishing	(		$11,000.00)
Per sq. ft. for varnishing and rubbing interior woodwork	(	$.04	
Per sq. ft. for painting interior woodwork	(	$.02	
Per sq. ft. net area for painting exterior woodwork	(	$.02	
Per sq. ft. for cold water painting	(	$.005	
277 Per sq. ft. over-all for painting miscellaneous ironwork	(	$.07	

Glazing		($22,236.00)
Hardware		($26,725.00)
Structural steel, including painting of same		($4,100.00)
Miscellaneous Iron work and Bronze		($130,552.00)
Metal Furring and Lathing		($19,468.00)
Per sq. yd. for furring and lathing on plain surfaces	($.75	
Per sq. ft. net girth measurement on moulded cornices, for cornice furring and lathing—not including rooms 218 and 219	($.125	
Sheet Metal Work		($1,283.00)
Total of the above—to equal amount of proposal		($1,277,358.00)

Alternatives.

Price additional for extra tile floor in machinery room—as marked "ALT" on drawing 201 and as explained by notes		($130.00)
278 Price additional for lining elevator shafts #101 and 102 with tile instead of plaster, as explained in specification		($9,000.00)
A—For clay tile, glazed. B—for white glass tiles		($11,500.00)
Alternative proposition, if any, for use of substitute marbles in the interior marble work, as provided by specification, to be fully described in separate proposal sheet, deduct the sum of		($41,000.00)

See separate proposal sheet.

Amount additional for furnishing metal covered window frames and sash in lieu of wood frames and sash on Whitehall and Bridge Street sides only—glazed with polished wired glass, all as described by specifications		($12,500.00)
Deduction if metal grilles are omitted in P.O. screen, as provided under heading of "Alternative, P.O. Screen" in specifications		($700.00)
Amount to be deducted if two of the mail boxes in the basement with mail chutes, etc., complete, are omitted		($1,800.00)

279-291 Blanks for amount of certified check enclosed, signature, and seals in usual form.

L. S.

In determining which is the lowest bid, it is understood that the Government reserves the right in awarding the contract to deduct any separate amount named in the proposal for any item mentioned therein.

Notice a certified cheque must accompany this bid to entitle it to consideration.

(Signature) JOHN C. ROBINSON,
Per ROY H. ROBINSON.

Address, 910-911 Rector Bldg., Chicago, Illinois.

* * * * * * *

292 *Treasury Department Telegram.*

Where written: Secretary's Office.

Washington, July 11, 1905.

To John C. Robinson,
113 Adams Street,
Chicago, Illinois:

Under original proposal for interior finish of new custom house, New York City, as you have been already advised, none of the bids were sufficiently low to justify letting the contract. The Architect thereupon recommended certain eliminations and modifications, the extent of which you have also been advised, and he recommends letting the contract for the interior finish, with these eliminations and modifications, at one million, thirty-seven thousand, two
293 hundred eigthy-one dollars and sixty-nine cents. Having been lowest bidder under original advertisement and proposal you are hereby tendered contract at foregoing figure. Advise your acceptance by wire.

L. M. SHAW.

Official Business.
Government Rates.
Charge Treasury Department, Appropriation for "Cont. Exps., Treas. Dept., Frt. Telegrams, etc."

Telegram.

Chicago, Ill., 11 July, 1905.

Mr. L. M. Shaw,
Secy. of the Treasury:

I will accept Contract for New York Custom house interior as Per your tender based on the Work as called for in my lowest act Proposal.

J. C. ROBINSON.

Telegram.

Chicago, Ills., 12th July, '05.

L. M. Shaw,
Secy. of the Treasury,
Washington, D. C.:

Our telegram of the Eleventh accepted contract for Vermo marble satisfactory samples will be furnished.

J. C. ROBINSON.

294 R.
J. C. P. G. D. E. L. A. S. W. F. F.

Treasury Department,

Office of the Secretary.

Washington, July 14, 1905.

Mr. John C. Robinson,
#113 Adams Street,
Chicago, Illinois:

SIR:

Referring to your proposal, received under advertisement of Marc 9, 1905, and opened May 8, 1905, for the interior finish of the ne Custom House building, New York City, in amount $1,277,358.0 the lowest of five received, and to the fact that the balance of th appropriation would not permit accepting such bid and that yo failed to price out various alternates required, and that the architec Mr. Cass Gilbert, after giving consideration to certain alternate priced out by the second bidder, and obtaining from said bidder de ductions from his original proposal of amounts for thirty-two item (not referred to in the original proposal sheet), which reduce his proposal for the entire work to one million, thirty-seven thou sand, two hundred and eighty-one dollars and sixty-nine cents ($1,037,281.69), recommended this amount for acceptance; and to th fact that, on request of the Secretary of the Treasury, dated June 1 1905, you submitted a revised proposal (on which you placed th date of your original bid, May 6, 1905), in which the alternat prices originally omitted by you were supplied; and to the supple mentary proposal, without date, naming the amounts you would de duct on account of each and every one of the above mentioned thirty-
two items (included in the second bidder's supplementa
295 proposal), making a total deduction of $146,684.00; and t
the telegram, dated July 11, 1905, addressed to you, whic is hereby confirmed, as follows:

"Under original proposal for interior finish of new custom house New York City, as you have been already advised, none of the bid were sufficiently low to justify letting the contract. The Architec

ereupon recommended certain eliminations and modifications, the
tent of which you have also been advised, and he recommends
rding the contract for the interior finish, with those eliminations
d modifications, at one million, thirty-seven thousand, two
ndred eighty-one dollars and sixty-nine cents. Having been lowest
lder under original advertisement and proposal you are hereby
ndered contract at foregoing figure. Advise your acceptance by
re".

(Signed) L. M. SHAW,
Secretary.

nd referring to your reply, of July 11, 1905, as follows:
"I will accept contract for New York Custom House interior as
r your tender based on the work as called for in *ly* lowest act
roposal.

(Signed) J. C. ROBINSON.

And referring to your telegram, dated the 12th of July, 1905,
s follows:

New York, New Cu.

"Our telegram of the eleventh accepted contract for Vermont
arble. Satisfactory samples will be furnished," you are advised
at this Department awards you the contract for the interior finish
r the new Custom House, New York City, for the sum of $1,277,-
38.00; less $41,000.00 on account of alternate for substituting best
grade of light cloud Rutland Vermont marble; less $1,650.00
36 for alternate for the omission of temporary dampproofing of
floors as specified; less $700.00 for alternate for omitting
etal grilles in post office screen; less $1,800.00 for omitting two
ail boxes and chutes; such four alternates being for items referred
o in the proposal sheet attached to the original specification, as filled
ut and submitted upon request of June 14, 1905; less $146,684.00,
eing the amount you deducted for the thirty-two items above
eferred to; and less the sum of $48,232.31 (the amount necessary to
ring the total to a sum to correspond with the amount of the tender
o you of the contract): making the net sum of $1,037,281.69 which
s the consideration of this contract.

It is understood and agreed that the entire work is to be com-
leted by October 15, 1906, instead of July 15, 1906 as specified,
his extension of time being made because of the delay in awarding
he work.

It is understood and agreed that this work is to be executed in
ccordance with the specification, dated March 9, 1905, and addenda
two) of April 28, 1905, and May 1, 1905, and drawings numbered
onsecutively from 201 to 210, inclusive, 400 to 446 inclusive, 628
o 638 inclusive, and 400-A; the explanatory directions of the
Architect, or his duly authorized representative, and to the satisfaction
f the Supervising Architect; it being understood that such drawings
re to be modified by the Architect so that they will correspond with
he requirements of the thirty-two items referred to above, which
re made a part of this contract and will be attached thereto; and it

is distinctly understood and agreed that all labor and materials necessary to be supplied in connection with such modifications are included in this contract.

297 It is understood and agreed that you are required to execute a formal contract, with bond for five hundred twenty thousand dollars ($520,000.00), guaranteeing the faithful performance of the work embraced in the contract, a form for which will be forwarded. This contract, with bond, must be executed in strict accordance with the rules printed at the head of said form, and be returned to the Supervising Architect of this Department at once.

You are further required to sign near the signature of the Supervising Architect, the stamped set of the drawings, above referred to, forwarded herewith under separate cover, and to return the same immediately for file in that office as the contract drawings mentioned on the second page of that instrument. To prevent your mistaking these plans for a working set, a label has been attached thereto, printed in red, designating them as "Contract Drawings."

New York, New Cu.

Your certified check for $20,000.00, which accompanied your proposal, and check of the Cashier of the National Capital Bank of Washington, in amount $5,000.00 subsequently submitted to accompany your bid, will be retained until the approval of your bond by the Secretary of the Treasury, of which you will be advised.

Payments on account of the work will be made, as required by the terms of the contract, upon vouchers prepared by the Architect, Mr. Cass Gilbert, when certified and issued to you by the Department's representative at the building, from the appropriation for "Custom-House, New York, N. Y.: Building."

298 & 299 Drawings and specifications for the work will be furnished you by the Architect, Mr. Cass Gilbert, 79 Wall Street, New York City.

Please acknowledge the receipt of this letter.

Respectfully,

J. B. REYNOLDS,
Acting Secretary.

* * * * * * *

300 *Contract Between the United States of America and John C. Robinson.*

Whereas, By advertisement, duly made and published according to law, proposals were asked for furnishing all of the labor and materials for the work herein provided for; and

301 Whereas, The proposal of John C. Robinson furnished in response thereto, was duly accepted, as hereinafter stated, on condition that he execute a contract in accordance with the terms of said bid.

Now, therefore, this agreement, made and entered into by and between L. M. Shaw, Secretary of the Treasury, for and in behalf of the United States of America, of the first part, and John C. Robinson, of Chicago, Ill., of the second part.

Witnesseth: That the party of the second part for the consideration hereinafter mentioned, covenants and agrees to and with the party of the first part to furnish all of the labor and materials and do and perform all the work required for the interior finish (as that work is specifically set forth in and required by the hereinafter-mentioned letter of acceptance dated July 14, 1905) of the new Customhouse at New York, N. Y., in strict and full accordance with the requirements of drawings numbered 201 to 210, inclusive, 400, 400A, 401 to 446, inclusive, and 628 to 638, inclusive, as modified by the Architect of said building (per page four of said acceptance) to correspond with the requirements of the thirty-two items modifications, eliminations, etc., hereinafter mentioned; and such other detail drawings as may be furnished to the party of the second part by the Architect of the building or by the Supervising Architect of the United States Treasury Department; the advertisement for proposals, dated March 9, 1905; the specification for the work; the proposals dated May 6, 1905, addressed to the said Supervising Architect by the said party of the second part; and letter dated July 14, 1905, addressed to the said party of the second
302 part by J. B. Reynolds, Acting Secretary of the Treasury, accepting said proposal; the addenda (dated (2) April 28 and (1) May 1, 1905) to said specification; the letter addressed May 8, 1905, by said party of the second part to said Supervising Architect, reducing said bid; the letter addressed June 14, 1905, by the Secretary of the Treasury to said party of the second part, calling for the alternate prices and detailed unit rates omitted from said original proposal and inviting prices (in competition with the other low bidder) on certain thirty-two items of proposed modifications, eliminations, etc.; the list of alternate prices and unit rates and the supplemental proposal for said 32 items of modifications, eliminations, etc., submitted in response by said party of the second part; the telegram addressed July 11, 1905, to said party of the second part by said Secretary of the Treasury and the two telegrams addressed July 11 and 12, 1905, respectively, by said party of the second part to said Secretary of the Treasury; a true and correct copy of each of which said papers is attached hereto and forms a part of this contract; and which said numbered drawings, bearing the signature of the said Supervising Architect and the signature of the said party of the second part, are on file in the Office of the Supervising Architect of the United States Treasury Department, and are hereby made part of this contract.

And the said party of the second part further covenants and agrees that the work herein agreed to be performed shall be commenced promptly upon receipt of notice of the approval of the bond hereto attached, and that the same shall be carried on in such order and at such times and seasons, and with such force as shall from time

303 Architect of the building or by the
to time be directed or prescribed by the / Supervising Architect or his representative, and that the same shall be completed in all its parts [within]* by October 15, 1906; [from the date of the approval of said bond hereto attached;]* that all materials used shall be of the very best quality of their respective kinds; that all the work performed shall be executed in the most skillful and workmanlike manner, and that both the materials used and the work performed shall
Architect of the building, subject to the approval of the be in every respect to the entire and complete satisfaction of the / Supervising Architect.

And the said party of the second part expressly covenants and agrees that the bond hereto attached shall be security, also, for the satisfactory performance and fulfillment of all the guarantees set forth in or required by said specification.

It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of four hundred twenty dollars, for each and every day the said party of the second part shall be in default, which said sum of four hundred twenty dollars per day, in view of the difficulty of estimating
304 such damages with exactness, is hereby expressly fixed, estimated, computed, determined and greed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for.

The party of the second part further covenants and agrees to hold and save the United States, its officers, agents, servants, and employees, harmless from and against all and every demand, or demands, of any nature or kind, for, or on acount of, the use of any patented invention, article, or appliance, included in the materials hereby agreed to be furnished under this contract.

It is further covenanted and agreed by and between the parties hereto that the said party of the second part will, without expense to the United States, comply with all the municipal building ordinances and regulations, in so far as the same are binding upon the United States, and obtain all required licenses and permits, and be responsible for all damages to person or property which may occur

[*Words enclosed in brackets erased in copy.]

connection with the prosecution of the work; that all work called
r by the drawings and specifications, though every item be not
rticularly shown on the first or mentioned in the second, shall be
executed and performed as though such work were particu-
5 larly shown and mentioned in each, respectively, unless
otherwise specifically provided; that all materials and work
the satisfaction of the Architect of the building
rnished shall be / subject to the approval of the said Supervising
rchitect; and that said party of the second part shall be responsible
r the proper care and protection of all materials delivered and
ork performed by said party of the second part until the comple-
on and final acceptance of same.

It is further covenanted and agreed by and between the parties
ereto that the said party of the second part will make any omissions
om, additions to, or changes in, the work or materials herein pro-
ided for whenever required by said party of the first part; the val-
ation of such work and materials to be determined on the basis
f the contract unit of value of material and work referred to; or,
n the absence of such unit of value, on prevailing market rates;
hich market rates, in case of dispute, are to be determined by the
aid Supervising Architect, whose decision with reference thereto
hall be binding upon both parties; and that no claim for damages,
n account of such changes or for anticipated profits, shall be made
r allowed.

It is further covenanted and agreed that no claim for compensation
or any extra materials or work is to be made or allowed, unless the
ame be specifically agreed upon in writing or directed in writing by
the party of the first part; and that no addition to, omission from, or
changes in the work or materials herein specifically provided for shall
nake void or affect the other provisions or covenants of this contract,
but the difference in the cost thereby occasioned, as the case
306 may be, shall be added to or deducted from the amount of
the contract; and, in the absence of an express agreement or
provision to the contrary, no addition to, or omission from, or
changes in the work or materials herein specifically provided for
shall be construed to extend the time fixed herein for the final com-
pletion of the work.

It is further covenanted and agreed by and between the parties
hereto that all materials furnished and work done under this contract
Architect of the building, the
shall be subject to the inspection of the / Supervising Architect, the
superintendent of the building, and of other inspectors appointed by
the said party of the first part, with the right to reject any and all
work or material not in accordance with this contract; and the de-
the Architect of the building, when approved by the
cision of / said Supervising Architect as to quality and quantity shall
be final. And it is further covenanted and agreed by and between
the parties hereto that said party of the second part will without
expense to the United States, within a reasonable time to be specified
Architect of the building, or by the
by the / Supervising Architect, remedy or remove any defective or

unsatisfactory material or work; and that in the event of the failure of the party of the second part immediately to proceed and faithfully continue so to do, said party of the first part may have the same done and charge the cost thereof to the account of said party of the second part.

It is further covenanted and agreed by and between the parties hereto that until final inspection and acceptance of, and payment for all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of
307 the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

It is further covenanted and agreed that the party of the first part shall have the right to require that any particular portion of the work here provided for shall be completed within such time as may be hereafter definitely specified by the said party of the first part in written notice to the said party of the second part; and that should the said party of the second part fail to complete such particular portion of the work within the time so specified, or fail to complete the entire work contemplated by this contract within the time or times herein stipulated or provided for; or fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided, the said party of the first part may withhold all payments for work in place until final completion and acceptance of the same, and is authorized and empowered, after eight days' due notice thereof in writing, served personally upon or left at the shop, office, or usual place of abode, or with the agent, of the said party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the said party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have
308 supplied the labor, materials, and tools, of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part shall be further liable for any damage incurred through such default and any and all other breaches of this contract.

It is further covenanted and agreed that the said party of the first part shall have the right of suspending the whole or any part of the Architect of the building, or of the work herein contracted to be done, whenever, in the opinion of the Supervising Architect, it may be necessary for the purposes or advantages of the work, and upon such occasion or occasions the said party of the second part shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; provided that for all such suspensions and other delays caused by the said party

of the first part the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect; provided, that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the said party of the first part.

And the said party of the first part, acting for and in behalf of the United States, covenants and agrees to pay, or cause to be paid, unto the said party of the second part, or to the heirs, executors, administrators, or successors, of the said party of the second part, in lawful money of the United States, in consideration of the herein-
309 recited covenants and agreements made by the party of the second part, the sum of one million thirty-seven thousand two hundred eighty-one dollars and sixty-nine cents ($1,037,281.69).

And the party of the first part covenants and agrees that payments will be made in the following manner, viz: ninety per cent of the value of the work executed and actually in place, to the satisfaction of the party of the first part, will be paid from time to time as the work progresses (the said value to be ascertained by the party of the first part), and ten per cent thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by said party of the second part in the event of the nonfulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract; provided, however, that no payment hereunder shall be due to the said party of the second part until every part of the work to the point of advancement reached—on account of which payment is claimed—shall be found to be satisfactorily supplied and executed in every particular and any and all defects therein remedied to the entire satisfaction of the said party of the first part.

It is an express condition of this contract that no Member of, or Delegate to Congress, or other person whose name is not at this time disclosed, shall be admitted to any share in this contract, or to any benefit to arise therefrom; and it is further covenanted and agreed that this contract shall not be assigned.

310-313 In witness whereof, The parties hereto have hereunto subscribed their names this 30th day of August A. D. 1905.

All erasures, alterations, and interlineations to be noted here before execution.

The erasures in lines 22 and 24, page 2, and the interlineations in lines 5, 21 and 26, page 2; 15, 32, 34 and 36, page 3; 14, page 4; and 11, page 5, were made before the execution hereof.

L. M. SHAW,
Secretary of the Treasury.
JOHN C. ROBINSON,
Contractor.

JAW. JKT. T. Place corporate seal here.

We hereby certify that this contract and bond have been correctly prepared and compared:

W. F. FIELD,
Acting Chief of the Law and Records Division.
JAMES C. PLANT,
Chief of the Computing Division.

Witnesses to the signature of the Contractor:
Two witnesses.
B. A. GALLIGAN.
JNO. L. McKENNA.

314 Treasury Department,

Office of the Secretary.

Washington, Oct. 22, 1906.

Mr. J. C. Robinson,
5 Bowling Green,
New York City.

SIR:

Referring to your contract for the interior finish of the new Custom House building, New York City, and to Department letter of July 28, 1906, directing you to restore to original conditions certain of the thirty-two (32) items submitted in the original acceptance, at the total deducted therefor, namely $114,531.00, you are advised that such letter is revoked, and the Department now directs you to reinstate the following items, for the lump sum of $200,044.01 additional to your contract, which amount is to cover all claims for extra compensation of whatever nature arising in connection with the original contract, and the additions and deductions thereunder, a public exigency requiring this action.

The items referred to are as follows:

Nos. 1, 2, 3, 4, 5-B, 6, 7 (except the work of changing terrazzo floors to marble) 8, 9, (except the work of changing terrazzo floors to marble) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, 26, 27, 29, 31, So much of item 22 as is required to change the fronts of elevators numbered 1, 2, 3, and 4, in the fourth, fifth, sixth, and seventh stories.

It is understood and agreed that it is a condition of this action that the time for completion of all the work included in your contract, and that hereby ordered, is June 1, 1907, and that such
315 extension is in lieu of all additional time which accrues to you on account of delays by the Government; and that you shall, within eight (8) days from this date, namely October 31, 1906, deposit with this Department the formal consent of the sureties on your bond to this change (a form for which consent is forwarded separately); also that, within the said eight days you deliver to this

epartment a schedule indicating the points of advancement you will ach on the first day of each month up to and including June 1, 907, so arranged as to insure the completion of the building on r before that date. Should you elect not to file such schedule by ctober 31, 1906, the Department will definitely direct the amounts f work to be performed in each respective month, in such sequence s appears most advantageous; and you are further advised if at any me it appears the work required for any month is not satisfactorily ompleted, such fact will be taken as conclusive evidence that you re in default under your contract, and the Department, in view of uch default, acting under the rights reserved by such contract, will roceed to finish the building at your expense and the expense of our bondsmen.

Any previous directions to you, relative to the stoppage or deferring of work affected by this order, are hereby canceled and revoked.

All work and materials required hereby are to be as called for under your existing contract; and all marble is to be furnished in accordance with the samples already approved.

The above action is based on the following clauses in your contract: (See lines 18 to 23, inclusive, page 3.)

316 & 317 "It is further covenanted and agreed by and between the parties hereto that the said party of the second part will make any omissions from, additions to, or changes in, the work or materials herein provided for whenever required by said party of the first part; the valuation of such work and materials to be determined on the basis of the contract unit of value of material and work referred to: or, in the absence of such unit of value, on prevailing market rates; which market rates, in case of dispute, are to be determined by the said Supervising Architect, whose decision with reference thereto shall be binding upon both parties; and that no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed."

It is understood and agreed that this action is not to affect in any way the rights of the United States under the terms of your contract, and it without prejudice to any and all rights of the United States against the sureties on the bond executed for the faithful fulfillment of the contract.

Payments of this additional sum of $200,044.01 will be made as required by the terms of your contract from the appropriation for "Custom-House, New York, N. Y.: Building."

Please promptly acknowledge the receipt of this letter.

Respectfully,

C. H. KEEP,
Acting Secretary.

* * * * * * *

318 *Formal Consent.*

Whereas, on August 30, 1905, John C. Robinson entered into a contract with the United States of America for the interior finish, etc., of the new Custom House at New York, N. Y.; and

Whereas, on October 18, 1905, the Federal Union Surety Company, The Empire State Surety Company and The Metropolitan Surety Company became sureties on the $520,000 bond given by said contractor to guarantee the performance of said contract (reference to which contract and bond is hereby made as part hereof); and

Whereas, in awarding said contract certain items of work were omitted in order to bring the cost within the amount of the
319 available appropriation therefor; and

Whereas, additional appropriations having been made and in view of the recommendations of the architect of said building in his letter of July 26, 1906, to the Supervising Architect, it is desired to re-instate certain portions of said omitted work at the price of two hundred thousand forty-four dollars and one cent ($200,044.01) additional to the price stipulated in said contract; which amount is intended to include and be in full payment for all claims for extra compensation of whatever nature growing out of said original contract and the additions to, deductions from, or changes in, the work embraced therein; and

Whereas, by letter addressed to said contractor October 22, 1906, and the letter amendatory thereof addressed to said contractor on October 31, 1906, C. H. Keep, Acting Secretary of the Treasury, for and in behalf of the United States, specifically enumerates the items of said omitted work which are to be restored and directs said contractor to re-instate and execute the same, for the above stated price (which has been fixed and determined as provided in lines 18 to 23 inclusive, of said contract and quoted in said Department letter), as an addition to said contract and so subject, generally, to all its stipulations and covenants; such addition to said contract being upon the express conditions that all work and materials required by said addition shall be as called for under said existing contract and all marble in accordance with the samples already approved, or to be approved, by the architect of said building and the Treasury Department; that all the work embraced in the existing contract and this addition shall be completed by June 1,
320 1907; that said contractor shall deliver to the Treasury Department by November 10, 1906, a schedule specifying the points of advancement he will reach on the first day of each month up to, and including June 1, 1907, so arranged as to insure the completion of all his work on, or before, that date; or—alternatively, should he elect not to file such schedule—the Treasury Department shall definitely direct the amounts of work to be performed in each month, respectively, in such sequence as appears most advantageous, and if at any time the work required for any month is not satisfactorily completed, such failure shall be taken as conclusive evi-

dence that said contractor is in default under said contract and the Treasury Department shall have the right to take the action provided in said contract for such default; that this addition shall be without prejudice to any and all rights of the United States under said original contract and bond, and that said contractor shall on, or before, November 10, 1906, deposit with the Treasury Department the formal consent of said sureties to said modification (copies of which said Department letters of October 22 and 31, 1906, are hereto attached and are hereby made a part hereof):

Now, therefore, know all men by these presents That we, John C. Robinson of Chicago, Ill., as principal, and the Federal Union Surety Company, a corporation organized under the laws of the State of Indiana and having executive offices in Indianapolis, Indiana; The Empire State Surety Company and The Metropolitan Surety Company, corporations organized under the laws of the state of New York and having executive offices in New York, N. Y., as sureties,

321 hereby consent and agree to the above-stated modification (as specifically set forth in said Department letter of October 22, 1906, and said amendatory letter of October 31, 1906) of said contract, and hereby consent and agree to remain bound upon said bond, and thus are held and firmly bound unto the United States of America in the penal sum of five hundred and twenty thousand dollars, lawful money of the United States, for the payment of which well and truly to be made to the United States we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this sixteenth day of November, A. D., 1906.

The condition of the above obligation is such that if said contractor shall well and truly perform and fulfill all of the stipulations and undertakings of said original contract and bond and the duly authorized additions to, or changes in, said contract (all as hereinbefore modified) and of the hereinbefore set forth modification of said existing contract, and of the requirements of said Department letters of October 22 and 31, 1906, and this instrument; and if said contractor shall well and truly perform and fulfill all of the stipulations and undertakings of any and all additions to, or changes in, said contract and the duly authorized additions thereto, or changes therein, which may hereafter be made (notice whereof to said sureties being hereby expressly waived); and if said contractor shall promptly make payment to all persons supplying material or labor in connection with any of said work, then this obligation to be void; otherwise, to be and remain in full force and virtue.

It is understood and agreed that nothing in this instrument

322 shall be construed as releasing the sureties hereto from any obligation, liability or undertaking resting upon them under, or by virtue of, said original contract and bond and the duly authorized additions to, or modifications of, said contract: Provided, that in no event shall the liability of the sureties hereto exceed the above-stated penalty.

In testimony whereof, the said John C. Robinson, as Principal and the Federal Union Surety Company, The Empire State Surety Company and The Metropolitan Surety Company, as Sureties, have hereunto subscribed their names and affixed their seals the date above written.

JOHN C. ROBINSON. [SEAL.]
FEDERAL UNION SURETY COMPANY, [SEAL.]
By ROBERT M. NUGENT,
Res. Vice President.

Attest:
MAY E. MC CABE,
Res. Asst. Secretary.

THE EMPIRE STATE SURETY COMPANY, [SEAL.]
By WALTER J. MOORE,
Asst. Vice President, and
DANIEL STEWART,
Secretary.
THE METROPOLITAN SURETY COMPANY. [SEAL.]
FRANK A. CONDON,
Actg. Vice President.

Attest:
M. JOSEPH MC CLOSKEY,
Asst. Secretary.

Signed, sealed and delivered in the presence of:
ROYE A. ROBINSON.
E. P. KNAPP.
CATHRYN F. ASPELL.
SAMUEL S. BOWMAN.
WARREN L. NEW.
D. P. SPOTTS.
WILLIAM HILBERT.
LOUIS A. H. HEAVISIDE.

Endorsed on cover: File No. 28,836. Court of Claims. Term No. 335. Roy H. Robinson, administrator of the estate of John C. Robinson, deceased, appellant, vs. The United States. Filed April 17th, 1922. File No. 28,836.

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WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 335.

ROY H. ROBINSON, ADMINISTRATOR OF THE ESTATE OF JOHN C. ROBINSON, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

BRIEF OF APPELLANT.

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CHAS. J. KAPPLER,
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INDEX.

	PAGE
Statement of Case	2
Appellant's Claim for Moneys Detained to Replace Protested Work	13
Assignments of Error	20
Argument	21
Liquidated Damages	21
Mutual Defaults Conceded	21
Apportionment of Damages Not Permissible	21
Court Erred in Holding Appellant Liable for Replacing Defects Due to Faulty Specifications Complied with Under Protest	42

AUTHORITIES CITED.

Caldwell & Drake vs. Schmulbach, 175 Fed., 429	39
Carnegie Steel Co. vs. United States, 49 Ct. Claims, 407	33
Champlain Const. Co. vs. O'Brien, 117 Fed., 271-77	30
Curry vs. Olmstead, 26 R. I., 462	35
Dannat vs. Fuller, 120 N. Y., 554	30
Dodd vs. Churton, L. R., 1 Q. B. 1897, 562, 568	23
Early vs. Tussing, 182 Mich., 314	41
Focht, vs. Rosenbaum, 176 Pa., 14	40
3 Halsbury's Laws of England, 243-5	41
Heckman vs. Pinkney, 81 N. Y., 211	40
Henderson Bridge Co. vs. O'Connor, 88 Ky., 303,	38
Holme vs. Guppy, 3 Meeson & Welsby's Reps. 386	30

Jefferson Hotel Co. vs. Brumbaugh, 168 Fed., 867-74 27
Jones vs. St. John's College, 6 Q. B. 115..... 34
Lilly vs. Person, 168 Pa., 219..... 40
Mitchell vs. Davis, 73 W. Va., 403-05..... 29
Mosler Safe Co. vs. Maiden Lane S. D. Co., 199 N. Y., 479 24
Northwestern Terra Cotta Co. vs. Caldwell, 234 Fed., 491 34
Pressed Steel Car Co. vs. Eastern Ry. Co., 121 Fed., 609 37
Russell vs. Bandeira, 13 C. B. (N. S.), 149..... 24
Stewart vs. Keteltas, 36 N. Y., 388..... 40
Thomas, Trustee, vs. United States, 53 Ct. Claims, 430 44
United States vs. United Engineering Co., 234 U. S., 241 22
United States vs. Gibbons, 109 U. S., 200..... 38
Village of Argyle vs. Plunkett, 175 N. Y. Supp., 751 29
Vilter Mfg. Co. vs. Tygart's Valley Brewing Co., 168 Fed., 1002..... 40
Walker vs. London & N. W. R. Co., L. R., 1 C. P. Div., 518 38
Weeks vs. Little, 89 N. Y., 568-70..... 32
Wilken vs. Wilkerson (Tex., Civ. App.) 41 S. W. 178 40
Willis vs. Webster, 1 App. Div. N. Y., 301..... 27

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No. 335.

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BRIEF OF APPELLANT.

This is an appeal by appellant from a judgment of the Court of Claims in his favor for $33,964.10 (Trans. rec., p. 23). The appeal, aside from some alleged minor errors of the Court below, is based, first, on the ground the Court of Claims erred in law in undertaking to apportion liquidated damages for delay in completing a contract wherein it has found the delay was due to mutual faults of both contractor and the United States, the Court splitting this item fifty-fifty between appellant and appellee; second, on the ground of error in holding the United States had a right after acceptance of

the contract to expend $10,401.45 (rec., p. 22) retained from the final payment in repairing principally certain window sash and a small number of appurtenant window frames, which sash the contractor had built of solid oak after protesting unsuccessfully against the specification as unsuitable and bound to warp, and which sash thereafter did warp and prove unsuitable as predicted and in warping affected certain of the window frames—number not proved by appellee and not found by the Court (p. 22).

Statement of the Case.

The United States, pursuant to an act of Congress approved March 2, 1899 (rec., p. 13), undertook the construction of what is now known as the New York City Custom House building. It first let a separate contract for the excavation and foundation work (p. 13) and then followed separate contracts for walls and structural steel work and for the mechanical equipment. These were followed by the letting of a contract by then Secretary of the Treasury Shaw (p. 45-7) to appellant, the lowest bidder, on August 30, 1905, for the interior finish at $1,037,281.69 (p. 14) after the architect and supervising architect had unsuccessfully endeavored to have the contract awarded to one Pierce, the contractor for the walls and structural steel work, whose contract was still uncompleted (p. 13), and it may be said in passing was very many months behind time, though this is immaterial here except in its incidental bearing on Finding XXIII in the instant case (p. 23).

The contract fixed the date for appellant to com-

plete his contract at October 15, 1906 (p. 14) and by stipulation (p. 28) it, with proposals, etc., has been printed only as to parts deemed material, the Court of Claims, by reference, making all these papers part of its findings of fact (p. 14).

On the subject of liquidated damages the proposal notified bidders that (p. 31) "time for the completion of the work shall be considered as of the essence of the contract" and that in place of extra rents, salaries and all other expenses entailed on the government by delay "the United States shall be entitled to the fixed sum of $420 as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States. Provided, however, that the collection of said sum may, in the discretion of the Secretary, be waived in whole or in part; and that the contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government.

"The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract, whenever, in its opinion, it would be inexpedient to carry on said work."

The contract as let read:

> "It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be per-

formed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of four hundred twenty dollars, for each and every day the said party of the second part shall be in default, which said sum of $420 per day in view of the difficulty of estimating such damages with exactness, is hereby expressly fixed, estimated, computed, determined and agreed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for." * * *

With another provision, as follows:

"It is further covenanted and agreed that the said party of the first part shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever, in the opinion of the Architect of the building, or of the Supervising Architect, it may be necessary for the purposes or advantages of the work, and upon such occasion or occasions the said party of the second part

shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; provided that for all such suspensions and other delays caused by the said party of the first part the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect; provided, that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the said party of the first part, the United States."

There was no provision for liquidated damages, as in some building contracts, upon separate branches of the contractor's job, as marble, ornamental iron work, tiling, etc.

But, there was a general provision for loss of the contract and of actual, not liquidated, damages as follows (p. 52):

"It is further covenanted and agreed that the party of the first part shall have the right to require that any particular portion of the work here provided for shall be completed within such time as may be hereafter definitely specified by the said party of the first part in written notice to the said party of the second part; and that should the said party of the second part fail to complete such particular portion of the work within the time so specified, or fail to complete the entire work contemplated by this contract within the time or times herein stipulated or provided for;

or fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided, the said party of the first part may withhold all payments for work in place until final completion and acceptance of the same, and is authorized and empowered, after eight days' due notice thereof in writing, served personally upon or left at the shop, office, or usual place of abode, or with the agent, of the said party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the said party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete, or have completed, the said work, and to supply or have supplied the labor, materials, and tools, of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part shall be further liable for any damage incurred through such default and any and all other breaches of this contract."

There was no action taken under the foregoing paragraph of the contract and hence no finding in regard to it by the Court of Claims.

There were a number of delays in the work by the Treasury Department due to suspension orders and

other causes prior to October 22, 1906. At the time of the letting of the original contract to appellant the Treasury Department desired to incorporate into the finish of the building certain work that would cause the total cost to exceed the available appropriation and the bids exceeding the appropriation in the original contract, it cut out certain items to bring the total cost within the appropriations. Later increased appropriations were obtained and on October 22, 1906 the Treasury Department directed appellant to do certain additional work beyond his contract for the lump sum of $200,044.01 (p. 54).

This letter directing appellant to restore the work, on the subject of time, provided:

> "It is understood and agreed that it is a condition of this action that the time for completion of all the work included in your contract, and that hereby ordered, is June 1, 1907, and that such extension is in lieu of all additional time which accrues to you on account of delays by the Government; and that you shall, within eight (8) days from this date, namely, October 31, 1906, deposit with this Department the formal consent of the sureties on your bond to this change; also that, within the said eight days you deliver to this Department a schedule indicating the points of advancement you will reach on the first day of each month up to and including June 1, 1907, so arranged as to insure the completion of the building on or before that date. Should you elect not to file such schedule by October 31, 1906, the Department will definitely direct the amounts of work to be performed in each respective month, in such

sequence as appears most advantageous; and you are further advised if at any time it appears the work required for any month is not satisfactorily completed, such fact will be taken as conclusive evidence that you are in default under your contract, and the Department, in view of such default, acting under the rights reserved by such contract, will proceed to finish the building at your expense and the expense of your bondsmen.

"Any previous directions to you, relative to the stoppage or deferring of work affected by this order, are hereby canceled and revoked."

The department never exercised this reserved right and hence there is no finding on the point.

Appellant's original contract had included approximately $500,000 worth of marble work (p. 42) and this supplemental contract increased this amount of marble work.

Appellant and his sureties signed the formal consent the government required (p. 56-8).

The Government's letter of restoration made the extension of completion of appellant's contract to June 1, 1907, due to the supplemental work, serve as a waiver of the additional time due appellant up to that date for delays which had accrued on account of defaults of the Government.

Subsequent, however, to the date of this supplemental contract evidenced by letters of October 22 and 31, 1906 (Finding III, p. 14) the Government suspended various parts of the work to be performed by appellant and completed by June 1, 1907, under the supplemental agreement.

The findings of fact of the Court of Claims on this point state (Finding XXIII, p. 25):

> The completion of the contract was delayed 121 days beyond June 1, 1907, the termination of the contract period as extended by the order and supplemental agreement set out in Finding III. Of this delay 12 days were held by defendant to be chargeable to the Government on account of delays in approving and returning the contractor's drawings. The remaining 109 days were held chargeable to the contractor, and liquidated damage therefor at the contract rate of $420 per day, amounting to $45,780, was, against the contractor's protest, charged and retained against him in the department's proffered final settlement on the contract, which sum the defendant still retains.
>
> Of the total delay in the completion of the contract but 61 days' delay was due to the fault of the contractor, the remainder of such delay being due to suspensions and other delays in the work caused by the defendant subsequent to October 22, 1906. The amount of the liquidated damages charged and retained against the contractor by the defendant on account of delay for which the contractor was not responsible, and was therefore not chargeable, was $20,160.

The Court of Claims had been requested by appellant to make the foregoing findings of fact more definite and certain, and the request was renewed and a substitute for the finding substituted to show that some of the suspension orders in question ran

beyond June 1, 1907, the date named for completion of the contract, and that some suspension orders in fact still existed in August, 1907, but the Court would not do so.

The nature of some of these suspensions, however, and that they in point of fact considerably exceeded 61 days or half of the 121 days in question can be gathered from the Court's opinion in the case. Thus, the opinion states (p. 24) that the Treasury Department admitted it should allow appellant twelve days in completion of the building (the drawing delays in fact many of them exceeding sixty days) "because of delay by the Government in furnishing certain drawings."

The Court found (p. 25) that there were other delays on the part of the Government and suspensions of performance of work which did by suspension of these parts delay completion of the whole work. The matter is thus expressed in the opinion:

> "We are not concerned with suspensions prior to the supplemental contract of October, 1906, because that contract extended the time of performance and took account of delays to that time, but if a suspension made prior to the October contract on part of the work was not lifted until after that date, and if such continued suspension of part so affected the whole of the work as to delay its completion within the contract time, then that suspension becomes material. And an instance of that kind happened. In August, 1906, an order directed the suspension of certain work, including marble work on the Bridge Street stairway No. 116, and the order to resume

work was not issued until the end of March following—more than six months. The architect himself states that the contractor was delayed by these items and would doubtless claim exemption upon them, but also concluded that the primary cause of the delay was the contractor's refusal to submit a reasonable bid for certain work. We take a different view of this matter and hold that inasmuch as the department could have fixed the price it need not have waited upon the contractor's bid, and in fact did not so wait, and that the suspension made in August and continued until nearly April did operate to delay completion of the work, which according to the supplemental contract was due to be completed by June 1. As early as December, and several times thereafter, the contractor had called on the department to be allowed to proceed with incidents connected with this particular work. We have not found that a period equal to the entire time of the suspension should be added to the time the contractor had within which to complete, but that a portion of it should be so added. Similarly, on account of other suspensions the contractor should have additional time. The extension of one day for each day's delay in the performance of the entire work caused by suspensions at divers times of parts of the work has been found in finding XXIII."

The Bridge Street stairs was a main stairway with much marblework.

The Court also found as a fact that the Department had proffered appellant a final settlement based on remission of the penalties for only twelve days (Finding XXIV, p. 23) and that the contractor

ing, has authority for the preparation of drawings and specifications therefor, and for the supervision of its construction; and is invested with the customary authority of an architect, except as limited by the regulations of the Department.

"The said Cass Gilbert, either personally, or by duly authorized representative, shall have the power and authority to inspect, examine, and approve or reject materials, methods and workmanship furnished or used under this contract, and to direct the conduct, management and progress of the work and any or all parts of the same."

"Inspection:

"Each bidder must understand that, should his proposal be accepted, the materials delivered and the work performed by him at any and all times during the progress of the work, shall be subject to the inspection of the Architect or his authorized representative, with the right to accept or reject any part thereof, that, in the opinion of the said Architect or his authorized representative, is not in accordance with the drawings and specifications; and that he must, at his own expense, within a reasonable time to be specified by the Architect, remedy any defective or unsatisfactory material or work, and in the event of his failure to do so, after eight days' notice, the Department shall have the right to have the same done and to charge the cost thereof to the Contractor's account." * * *

"Final Acceptance (p. 34):

"It is required that all work included under

this contract must be delivered in good condition at the time of completion and delivery of the building to the Government, and no reason or excuse for failure to so deliver it, *other than the acts or orders of the Department or its representatives,* will be valid. Previous acceptance, alleged approval or failure to object to conditions or methods shall not constitute a justification for defects, if any, which may appear at delivery." (Italics ours.)

"Guarantee:

"The Contractor is required to guarantee and maintain the stability and satisfactory condition of all material and work furnished under this contract, and keep the same in perfect condition for one year after the issuance of the final certificate, except as otherwise specified, stipulated or specifically set forth in the contract.

"Attention is called to other special guarantees for a longer period as hereafter required.

"Original defects, or defects, breakage or deterioration resulting from reasonable and customary use or wear of materials furnished, when used for the purpose intended in a usual and proper manner, which may appear within one year, must be made good by the Contractor, at his own expense, whenever called upon to do so by the Secretary of the Treasury. Such repairs are to be executed under the direction of the Architect, and to his satisfaction, it being required that all work is to be in perfect condition when such period of one year shall have elapsed, with the following exceptions:"

And the following special conditions or specifications (p. 38):

> "Sash for Outside Windows: * * *
> "Exterior sash in basement and sub-basement windows to be white pine. All other sash to be of oak, glazed generally with plate glass, as elsewhere specified, with exceptions noted. See 'Glazing.'
> "Straight grained wood to be used in al sash."

> "Interior Frames and Sash:
> "Interior window frames, are to be constructed generally as per typical details. Any portion not definitely covered to be of section and construction similar to others of same general kind. Wood of interior window frames to be *solid oak*, except as specified otherwise." (Italics ours.)

Appellant objected before erection to the specification calling for solid oak sash and specially directed the attention of the Government to the fact that such solid oak sash in window frames would be sure to warp and twist, due to warm inside air and cold outside air, especially in the damp atmosphere of lower New York City adjacent to the water front and made suggestions to the Architect to meet the conditions. His protests were overruled and he was directed to follow orders, and under protest did so. Events after the Government took the building over justified the appellant's protests. Nevertheless, the Government at the instance of the Architect and Supervising Architect retained $12,000 admittedly due

the Contractor, above liquidated damage and other retentions, and after appellant had left the job spent $10,401.45 of the money without consulting the Contractor in making good the effects of its improper specifications (p. 22).

The Architect was to receive under his contract with the Government 5 per cent for his services (p. 13). The Supervising Architect allowed the Architect 10 per cent or $1,072.26 for supervising the work of remedying his own faulty specifications and remedying two minor alleged defects costing $321.20 and exhausted the balance of the $12,000 by charging up $205.09 or the difference to compensation for alleged deficient character of certain mirror frames. (Nos. 4 and 5—Finding XXII, p. 22). The Court of Claims disallowed Nos. 4 and 5 (Conclusion of Law —Finding XXII, p. 23) and held that under the Guarantee Clause of the Proposals the Government had the right, regardless the error was its own, to charge against appellant the $10,401.45 expended to make good the Architect's faulty specification complied with by appellant under protest.

The matter is thus set forth in the Findings of Fact (Findings XXI and XXII, p. 22):

XXI.

> The contract called for most of the window sash of the building to be of solid oak, which wood is not especially suited for a damp climate and locality, such as lower New York City, on account of its liability to warp under damp and changing conditions of moisture and temperature.

The contractor, before putting in the windows, called the architect's attention to this fact and suggested a modification of the form of construction of the sash for the purpose of obviating as much as possible the danger of their warping, which suggestion was not accepted by the architect or department. Owing to the fact above stated, and to the further facts that the materials of some of the sash were not of the best quality, nor thoroughly seasoned, and that the workmanship in their construction and installation was in some instances not of first-class character, there occurred, before the completion of the building and within one year after the issuance of the department's certificate for final settlement, much warping, shrinking, and misfitting in a very large part of these sash, which required extensive repairs of an expensive character. The department demanded of the contractor that he make these repairs, which he refused to do except as extra work for which he should receive extra compensation. To this the department would not agree. Subsequently the contractor repaired a small part of these windows, about 12 in number, but under written protest and notice to the department that it was extra work for which he expected extra compensation. Later he presented a claim of $1,043.69 for this work, which was disallowed by the department.

XXII.

In a report of February 7, 1908, to the Supervising Architect, the architect of the building recommended that the department retain

from the contract price for the work the sum of $12,000 for the repair of said window sash and of window frames, and the completion and repair of certain other items of work on the building which the contractor had failed to do, any balance remaining over from the work to be paid to the contractor; and upon this report and recommendation the Supervising Architect, in his report and recommendation of March 13, 1908, to the Secretary of the Treasury for final settlement with the contractor, recommended the retention of said sum for the purpose stated. In accordance with these recommendations said sum was, against the contractor's protest, so retained by the department, and against this retained sum there were subsequently charged by the department expenditures, etc., as follows:

1. For repairing said window sash, and also some of the said window frames, and for repair and completion of some other work which the contractor had failed to perform, $10,401.45, the greater part of which sum was for sash repairs.

The court's opinion on this point is set forth at page 26 and holds in substance that where a contractor guarantees the stability for one year of his material and work (p. 34) the guarantee holds good against material and work he was forced to put in by express orders after protest the same as where the fault was his own. The court did not find and there was no evidence, so the appellant could not meet same, which or how many sash or frames were

the Court cannot apportion; the thing to be done is indivisible not divisible in the absence of a division provision in the contract, unless a new date is fixed before completion by agreement or lawful orders, the matter is at large and actual damage must be shown; what the contractor would have done had the owner been free of fault and the contractor unhampered, is pure speculation.

In the instant case the contractor was under suspension orders when June first arrived.

In United States vs. United Engineering Co., 234, U. S., 241, the Court said:

> "The precise question here is whether, when the work was delayed solely because of the Government's fault beyond the time fixed for its completion and afterwards the work was completed without any definite time being fixed in which it was to be done, the claimant can be charged for the subsequent delays for which he was at fault by the rule of the original contract stipulating liquidated damages, or was that stipulation waived by the conduct of the Government and was it obligatory upon it in order to recover for the subsequent delays to show the actual damages sustained? We think the better rule is that when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party *must not prevent the performance of the contract within the stipulated time*, and that where such is the case, and thereafter the work is complet-

ed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date, to do this would permit to recover damages for delay caused by its own conduct.

"It may be that damages were sustained by the failure to carry out the subsequent agreement. But the Government, as well as the claimant, saw fit to go on with the work with no fixed rule for the time of its completion, so that it be reasonable, and the Government required no stipulation in the second and third supplemental contracts as to damages in a fixed and definite sum for failure to complete the work as required. Under such circumstances we think it must be content to recover such damages as it is able to prove were actually suffered.

"This conclusion is in accord with the rule of the English cases. In Dodd vs. Churton, L. R., I. Q. B. 1897, 562, 568, Chitty, L. J., said:

> 'The law on the subject is well settled. The case of Holme vs. Guppy (3 M. & W., 387), and the subsequent cases in which that decision has been followed are merely examples of the well known principle stated

in Comyns' Digest, Condition L (6), that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. The law on the subject was very neatly put by Byles, J., in Russell vs. Bandeira (13 C. B. (N. S.), 149). This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a particular day or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time.'

"The same rule was followed with approval by the New York Court of Appeals in a well considered case, Mosler Safe Co. vs. Maiden Lane S. D. Co., 199 N. Y., 479, in which it was held that, even where both parties are responsible for the delays beyond the fixed time, the obligation for liquidated damages is annulled, and in the absence of a provision substituting another date it cannot be revived, and the recovery for subsequent delays must be for actual loss proved to have been sustained."

Mosler Safe Co. vs. Maiden Lane S. D. Co., *supra*, is instructive and decisive.

In that case the defendant made the point as to whether liquidated damages, conceding there had been mutual delay, should not be allowed from a date fixed by the architect beyond the contract date as being the period of time in excess of the contract period when the work should have been finished by

plaintiff notwithstanding defendant's delay—the architect apportioning the time these mutual delays caused in completion of the contract. The defendant contended that the architect having so fixed the time his acts could not be questioned "unless o arbitrary and capricious as to indicate fraud or bad faith."

The Court said:

> "While the contract did constitute the architect named therein the final arbiter in disputes 'regarding the construction of the specifications' and 'as to whether materials used and work done were according to their true intent and meaning, he was, in other respects, the *agent of the appellant*. It was provided that the work was to be done to his satisfaction and under his direction, and in determining upon the plans and drawings, or upon changes therein, or in the work, he was the representative of the appellant. (Note: In the instant case the Treasury Department itself gave and lifted the suspension orders.) It was not necessary, if the jury believed that through any acts of his, or through his omission to act within a reasonable time, substantial delays in the completion of the work were caused, that his conduct should indicate fraud or bad faith. The question was, whether the appellant, through its architect, or otherwise, was responsible for materially delaying the respondent in the completion of the work within the time specified. The question of the architect's good or bad faith was not material.
>
> "It having been conclusively determined that the defendant was responsible for a substantial part of the delay in the completion of

the work, the principal question arises upon the instruction of the trial Court that thereby the right to counterclaim for the liquidated damages was abrogated.

* * * * * *

"Such an obligation could not be renewed except by some express agreement. Its nature forbids inferring its renewal. An apportionment of the fault is impossible under such a contract, Weeks vs. Little, 89 N. Y., 566. The rule that there can be no apportionment of the damages for delays caused by mutual default has, also, been asserted in the Federal Courts, Caldwell & Drake vs. Schmulbach, 175 Fed., 429." * * * (Note: In which the contract itself provided for apportionment, page 434.)

"The appellant founds an argument upon the provision of the specifications that, if the defendant should require any alteration or deviations, the same could be made without annulling or invalidating the contract, and that in such event an allowance shall be made for the same on one side or the other as the case may be by the architect. This does not affect the question differently. The provision operated to prevent the plaintiff from claiming that the contract was invalidated. It could not renew the obligation to pay liquidated damages, which had been put an end to by delays, for which the appellant was, in part, responsible.

* * * * * *

"Where the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled, and, in the absence of some provision

under which another date can be substituted, it cannot be revived. If the respondent failed to complete within a reasonable time after crediting the appellant's delays, then the latter had a cause of action for the former's neglect and the measure of damages would be the actual loss proved to have been sustained."

Willis vs. Webster, 1 App. Div., N. Y., 301:

> "Where liquidated damages are to be sustained after a given day, the plaintiff contractor is entitled *to know with precision* when he is laboring under an obligation for liquidated damages, and not be required to leave it to the judgment of a jury as to what is a reasonable time. It is impossible under the contract to apportion liquidated damages. Either the liability for the liquidated damage exists, or it does not. It cannot half exist and half be waived. In the case at bar there was a definite contract, which was abrogated by the acts of both parties, and it requires equally concerted action to breathe life into it again." (Italics ours.)

If not to be left to a jury's judgment, why to the courts? Is it more capable in a building matter on a question of fact than a mixed jury?

Jefferson Hotel Co. vs. Brumbaugh, 168 Fed., 867-74:

> "Where the owner let a large amount of work to independent contractors and their delay caused part of the general contractor's delay, the owner is chargeable with the independent contractor's delay, and the general contractor is relieved as the Court will not attempt to apportion the delay.

"It is vigorously urged that the contractor was responsible for a number of days of delay and the defendant company for only a few of the days thereof, and that the Court, under such circumstances, should attempt to apportion such delay between the two and hold the contractor liable in penalty for those days that it, in its judgment, deems he may be chargeable with. This is just what the courts cannot, with any degree of certainty, do, and therefore refuse to do. It needs but a moment's practical consideration of common building operations to realize that a contractor may not complete the woodwork until the plastering is done; he may not in many instances complete the cement work until the plumbing is placed; he may not do the painting until the marble work is done. To perform his work he is entitled to work upon an orderly and systematic plan. It could not be required of him to move his scaffolding, his tools and implements, and his workmen back and forth from one quarter to another just as the other contractors might complete in one quarter a part of the heating, in another part the plumbing, and in another the tile and marble work, in order that he should be free from the charge of delay. Courts cannot know of these conditions as they actually existed at the time, and the evidence would be very unsatisfactory, taken months after, that would attempt to set forth all such conditions. Therefore the courts have laid down a very salutary rule to the effect that they will not attempt to apportion such delays where the causes thereof have been mutual, but will refuse under such circumstances to enforce the penalty. The law on this matter

is well laid down in a series of New York cases."

Village of Argyle vs. Plunkett, 175 N. Y. Supp., 751, action for liquidated damages, held:

> "The referee found as a fact that the village delayed the contractor 21 days in completing the work. The evidence supports this finding. This delay was a substantial hindrance to the progress of the work.
>
> "Where one party to a contract is himself partly responsible for the delay in the completion of the work, the clause in the contract providing for liquidated damages *is abrogated, an apportionment of liquidated damages under such circumstances will not be tolerated.* * * * Whenever a party attempts to enforce a claim for liquidated damages he should be quite certain that he is himself without fault. * * * Liquidated damages savor of a penalty. The levying of such damages upon the party in default is a drastic enforcement of the contract. The party insisting upon this literal, strict and severe enforcement of the terms of a contract must be wholly free from fault."

Mitchell vs. Davis, 73 W. Va., 403-05:

> "Liquidated damages, being an entirety, cannot be apportioned between the parties when both parties are in default. *There is no way of ascertaining to what extent the default of one affected the default of the other.* (Italics ours.) When both parties are to blame for non-compliance with the terms of

a contract there can be no apportionment of the liquidated damages therein stipulated for.

Delay of performance by a party otherwise entitled to liquidated damages operates as a waiver, Dannat vs. Fuller, 120 N. Y., 554.

Or, as expressed in Champlain Const. Co. vs. O'Brien, 117 Fed., 271-77:

> "Plans and materials to be furnished by the company were not provided till after the contractors were entitled to them, and these hindrances contributed substantially to the delay for which the deductions were made. If they should be left to stand, the company would recover damages of the contractors for its own neglects. There is no way for summing up the defaults of each and apportioning the damages to them, but the whole must be allowed or none, and as all cannot be, none must be. These deductions must therefore be restored."

In the foregoing case as in the instant case the contract contained provisions for work to be performed per schedule with right in the chief engineer to decide questions of delay arising and for the work to be taken over by the owner if speed of construction were not satisfactory.

Holme vs. Guppy, 3 Messon & Welsby's Reps. 386.

This was a building contract containing a provision for liquidated damages for each day's delay in completion beyond a named date. Completion was delayed for five weeks and after much testimony

Counsel agreed four weeks of the time was due to defaults of the owner and one week to delay due to defaults of the builder's workmen, and the case was resumed on the law point involved.

The court, by Baron Parke, held: "We think no deduction ought to be allowed to the defendants. It is clear, from the terms of the agreement, that the plaintiffs undertake that they will complete the work in a *given* (italics the courts) four months and a half; and the particular time is extremely material, because they probably would not have entered into the contract unless they had had those four months and a half, within which they could work a greater number of hours a day. Then it appears that they were disabled by the act of the defendant from the performance of *that* (italics the courts) contract; and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default."

The wisdom of the English rule that because a contractor is willing to stipulate he will do certain work within a fixed period it does not follow if delayed he will perform within the fixed period plus the period the owner delays or suspends performance and pay liquidated damages ascertained after final completion is obvious where the work is building construction and especially largely marble—an industry with comparatively few and closely unionized mechanics. Appellant might have been able to get a large number of them in the dull months. Does it follow he could in the rush summer season when all New York city construction is anticipatory of

"moving day," October first. And if it came a question of balancing overtime wages against liquidated damages, is not a contractor entitled to know when the latter is to start?

Weeks vs. Little, 89 N. Y., 566-70.

This was a case involving whether plaintiff contractors for marble work, elevators and steam heating apparatus were liable for liquidated damages in not complying with a time limit in a building contract. The referee found as a fact that the plaintiffs as to certain parts of their contract work were "delayed and prevented from completing" within the contract period by defendant's failure to furnish and put in place certain work on which this part of plaintiff's work was to be imposed and also (p. 569) that "plaintiffs did not complete some part of their work which was not dependent upon the defendant's action until December 24"—the contract date being October 1 (p. 568). The referee and lower court held liquidated damages applied.

The Court of Appeals held the rule "is well settled that where the work to be performed by the builder cannot be performed until the other work provided to be done by the owner or his employes is finished, the failure by the latter *to complete their work in season* to enable the builder to end his within the time limited by the contract is a sufficient excuse for his delay beyond the agreed period of completion," * * *

"It is true he (the referee) finds that some work was delayed which was not affected by the delay of the defendant. We do not see how that fact alters the just result. To effect that would require us to

assume what is not proved, and we cannot know, that there would have been delay in the independent work if the dependent work had not been hindered. The contractor could gain nothing by haste and pressure in one direction so long as entire completion was delayed by his employers. *We cannot divide and apportion the fault. It is enough that damages were payable upon a failure of entire completion,* and that was rendered impossible by the defendant's act, and her executor cannot recover for a failure which she made inevitable. But for that we cannot say that there would have been any delay beyond the contract time . (Italics ours.)

Carnegie Steel Co. vs. U. S. 49 Ct. Claims 407.

> "The parties could have stipulated for liquidated damages based upon the contract prices for the separate instalments and to run from the respective dates fixed for the delivery of the separate instalments; but they stipulated otherwise when they provided that the damages should be computed from the date fixed for final delivery of all the armor. Without interpolating a clause which the parties did not use we cannot construe these provisions of the contract as being affected by the dates for delivery of separate instalments of the work."

The Court of Claims attempts in its opinion to get around these authorities and to hold they do not apply with the assertion that it, in its conclusion awarding the amount in dispute as to 60 days at $420 per day to the contractor and 61 days to the United States, is not "apportioning" the delay due to mutual defaults, that United Engineering Co. vs. the United States, *supra*, is not applicable, and that it

is, in stead of "apportioning" the time between owner and contractor, "computing" the same under a contract provision not naming a date but enabling one to be definitely fixed—by computing or apportioning the fault between the parties. To Counsel it seems like an advocates special pleading of a hard case, swaying the law not interpreting it.

United Engineering and other cases lay down a rule of policy, that the party who wants the pound of flesh, the literal interpretation and the rigid fulfilment of the contract, must not be blameworthy, must not leave to uncertainty and settlement day the time when the muleting for delay in liquidated instead of actual damage is to start and must have the contractor know while he is performing and not afterwards that he is under the penalty.

Liquidated damage contracts while enforced are not viewed with distinguished favor. Since the judicial decisions upholding them there has been some tendency to carry them too far and as said in Northwestern Terra Cotta Co. vs. Caldwell 234 Fed. 491, "several states have prohibited liquidated damage claims except under statutory limitations or with statutory modifications."

It would have been competent perhaps for the Government to have inserted a clause that in the event of suspension of any part of the work the contractor could obtain an extension of time by applying for it within a fixed period and should not be entitled to such extension or be relieved from the time obligations of the contract unless he did so apply within the time limit, Jones vs. St. John's College, 6 Q. B. 115. But it is sufficient to say that the

contract contained no such provision. Even in such cases the courts do allow the delays due to the owner though not claimed at the time, Curry vs. Olmstead, 26 R. I., 462.

The Court of Claims in its opinion recognizes the injustice and unfairness of permitting the owner when it comes to accounting to the contractor and the owner has caused the delay to determine in his own favor how much delay he will admit he has caused the contractor. It holds that the Government did delay appellant far longer than it was willing to admit, 60 days instead of 12, and gave judgment for the difference. But it then says it, the court, can go to the contract and it, the court, fix a new date. Its finding and opinion is one that the Treasury Department erred in law and in fact and was guilty of a gross mistake in its settlement and that the Treasury Department, through its architect and supervising architect, and lawful suspension orders compelled one-half the overtime in appellant's completion of his contract. Where does the Court of Claims get power from the contract to so distribute the delay in the form of a judgment? What is it doing but "apportioning" delays? Where is the contract provision authorizing and empowering the Court to ascertain the "definite period from which the liquidated damages are to be computed?" The foregoing authorities express that courts cannot do so under their general powers as judicial tribunals, but err if they attempt to pass on mutual delays in such contracts except to hold the liquidated damage clause annulled. The Court in its opinion states that the Secretary of the Treasury did not

follow the supervising architect in that regard and also that the Treasury's 12-day drawing-delays allowance was not conclusive and further was not fair or reasonable in view of the suspension orders. The, courts, vide United Engineering Company case, cannot lawfully do so whatever their lawful power to enforce specific contracts of the parties.

It is not necessary to be here passed on, but if it were counsel would contend the language of the contract correctly construed gave the supervising architect no power or authority after completion of the work to ascertain delays due to suspension orders. He was the legal representative of one party to the contract, and not even an unbiased representative for he had tried to prevent appellant as the lowest bidder getting the contract and with the architect was overruled by the Secretary. Appellant's troubles began that day. The Supervising Architect did not undertake when he gave or lifted suspension orders to fix at the time a new date from and after which liquidated damages should run. In fact had he so fixed he, as to certain of the suspension liftings, would have had to name a date subsequent to either the contract date of June 1, 1907, or the court date of 60 days afterwards, for the written liftings as to some suspension items essential to use of the building, notably collectors, naval officers and surveyors' suites, Ceramic floors in the basement and toilet accessories if this court chooses under its power to make call on the Court of Claims for more definite findings, were in August and September, 1917.

The language of the proposal is (p. 31) "that the

contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government." To the average contractor this would mean that as to any suspension in a substantial matter "one day's suspension one day's delay," certainly if the suspension order or lifting named no other time. The contract reads (p. 523): "for all such suspensions and other delays caused by the said party of the first part the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect." This, it would seem, would not be read by the average contractor differently from the proposal form except that delays other than suspensions would be ascertained by the Supervising Architect, as involving matters not perhaps mathematically calculable as in suspension orders, but that these extra days would be announced to him at the time so he would know his dates and govern his construction operations accordingly. Such a construction might conform interpretation to legal authorities; a contrary construction would not. Between two interpretations, one favorable to and the other against the law the former prevails. So between reasonable and unreasonable results from interpretation. Likewise interpretation construction where two may prevail is mostly against the draftsman of the contract.

Pressed Steel Car Co. vs. Eastern Ry. Co., 121 Fed., 609-11.

Where the language of an agreement is contra-

dictory, obscure or ambiguous, or where its meaning is doubtful so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair or improbable contract.

U. S. vs. Gibbons, 109 U. S., 200.

It would seem by analogy to clauses in construction contracts, such as that in the Robinson contract, permitting owners to annul the contract and take charge of operations if proper speed be not made, that the fixing of the new date in any event must be at the time of the owner's delay and not after completion of the contract—must, in fact, create a new contract, expressed or implied.

The power to establish a forfeiture must be exercised within the time mentioned in the contract, and before the time for the completion of the contract has expired.

Henderson Bridge Co. vs. O'Connor 88 Ky., 303.

Walker vs. London & N. W. R. Co., L. R. I. C. P. Div., 518.

While the authorities are fewer in construing liquidated damage contracts with a contract clause in case of mutual delays authorizing some one to certify to delay or for arbitration of same, counsel know of none that, if such were a correct interpretation of the instant contract, would sustain the Supervising Architect had he ascertained the suspen-

sion delays, much less a court's undertaking so to do and there are a few to the contrary.

Caldwell & Drake vs. Schmulbach 175 Fed., 429.

The contract, as to liquidated damages, provided (p. 432):

> "The contractor agrees and binds himself to have all the work contemplated by these articles finished and ready to turn over to the owner by December 31, 1905, and in case of a failure in this particular, agrees to pay to the owner the sum of $50 per day as measured damages for each and every day beyond the said 31st day of December, 1905, that the said failure exists, provided, however, that said contractor shall have credit for such days as the architects and owner shall certify at the time as the days when the weather forbids work; *and credit for each and every day he is delayed by the owner or other contractors employed by the owner, if such delay is also certified to by the architects and owner at the time it occurs.*" (Italics ours.)

The record shows the court, following Sun Printing Assn. vs. Moore and other cases, recognized fully the doctrine of liquidated damages as applicable. It then held:

> "The principles here established have no application to cases where, under such contracts for liquidated damages for delays, such delays have arisen from (a) the fault of the owner; or (b) that of his agents and independent contractors; or (c) by the joint and mutual default of owner and contractor.

Such cases must be governed, I conceive, by the rulings in such cases as Jefferson Hotel Co. vs. Brumbaugh 168 Fed., 867; Vilter Mfg. Co. vs. Tygart's Valley Brewing Co., 168 Fed., 1002; Stewart vs. Ketaltas, 36 N. Y., 388; Heckman vs. Pinkney, 81 N. Y., 211; Weeks vs. Little, 89 N. Y., 566; Lilly vs. Person, 168 Pa., 219; Focht vs. Rosenbaum, 176 Pa., 14; Wilkens vs. Wilkerson (Tex. Civ. App.) 41 S. W., 178. In the Jefferson Hotel case, *supra*, the Circuit Court of Appeals for this circuit fully considered this very question, and determined that the courts would not undertake to "apportion" the damages occasioned by mutual delays and I think very clearly set forth some of the pertinent reasons why it would not do so. In this case there can be no question that the delays were the result of mutual default. It is not denied that the ground upon which this building was to be and was erected was hemmed in by other buildings; that in the very start wholly unexpected and extraordinary measures, not contemplated by the contract, had to be taken to protect these adjoining buildings from damage and destruction; that the architects by some strange error by their plans and specifications provided for a larger building than the lot of ground would contain; that a number of additional contracts were let to contractors wholly independent of plaintiffs, who delayed the work; that a very great number of changes were made, so many, in fact, that the original specifications could hardly describe the final result. Under such circumstances, I am clearly of the opinion that this case, like the Jefferson Hotel one, presents a very striking example of how im-

possible it would be for a court to attempt to determine and apportion the cause of delay between the owner and contractor, both of whom are in default. *But it is insisted that the contract itself here provides in express terms for such apportionment of delay, and in this particular differs from the terms of the one in the Jefferson Hotel case. It seems to me that this cannot change the situation.* The law is that courts by reason of the very uncertainty, the impossibility to fairly and justly determine the causes of such mutual delays and their effects will not attempt to apportion."

Early vs. Tussing 182 Mich, 314, was a case of a building contract with a provision for arbitration and for liquidated damages. The arbitrators undertook to apportion the liquidated damages, charging 150 days or two-thirds of the delay to the complainants, the contractors, and one-third to the owners. A question arose as to whether the contract provided for arbitration of this item, but the court held that the contract did include liquidated damages within the submission to arbitrators (p. 324). It overturned the arbitration, however, on the ground that as to liquidated damages the award "was a gross and palpable mistake of law."

It held in substance, citing 3 Halsbury's Laws of England, 243-5 and the English and some American cases, that "there must be a definite date from which liquidated damages are to run" and that "for delay in consequence of some delay caused by the employer" there must be a power when the delay occurs to extend the time and this power must be ex-

ercised at the time and a new date named and not left to be claimed at the accounting and settlement.

Second Claim. The Court Erred in Holding Appellant Liable for Replacing Defects Due to Faulty Specifications Complied With Under Protest.

This claim asks recovery of items of $1,043.69 and $10,401.45 embraced in Findings XXI and XXII. The Court of Claims ruled against appellant on the ground that he had guaranteed the work for one year. The facts are fully set forth in the Statement of the Case.

The legal proposition advanced by the learned court below and on which the case turns is that a contractor giving a year's guarantee must make the work constructed good for one year regardless of whether he performed his contract in the best possible manner and regardless of the fact that the defects developed were due to faulty and improper specifications complied with by the contractor only after protest and prediction that strict compliance would result in the very defects which later developed. It seems to counsel that the matter after all is but a phase of the general legal principle that a party cannot recover for his own negligence. Is the legal principle any different, taking the guarantee at its most disadvantageous angle to appellant? The contract was an entire, indivisible one. Can it be said appellant followed orders lawfully given him by appellee at his, the appellant's, own risk? Had he a right to refuse compliance with the orders? Must he refuse and risk annulment of his whole contract? Or, if he complied, take on him-

self the consequences of appellee's error? Can the appellee profit by its own wrong? What right had appellant to assume the final say? If the rule of reason is to govern judicial decisions then the guarantee and appurtenant provisions of the contract must be construed not to relate to work performed properly under protest against unwise requirements, but as a guarantee protective of appellee against appellant or his work and materials for the period of one year and not as protective of appellee against its own shortcomings. This legal proposition determined in appellant's favor the conclusion from the Court's finding must be in favor of appellant.

It was to be expected the architect and supervising architect would seek to throw the blame for their errors on appellant as far as they could do so. But the utmost the Court of Claims attempts is to state that the materials of some of the sash and some workmanship were not first class. The vast bulk of this construction it is apparent did meet specifications and it is obvious the difficulty was with the Government requirements. How much the predicted warping affected adjacent material and made possible a claim, after the event, it was not good or well installed in the first place is manifestly impossible. The architect had full control over the contractor and power of rejection of materials and workmanship. How fully he exercised it is apparent from the marble findings (No. XI) where though the contract required him to select the marble or change same while "in the yards of the contractor or in the market" (p. 36) he undertook to reject marble slabs to meet his ideas from time to time as to the

color scheme after the marble slabs had been in place in the walls for months with other marble superimposed upon it. All sash, frames and work were under his inspection by the terms of the contract.

It is submitted the burden of proof was on the Government of showing the quantity and value if any of materials replaced within a year to take the place of any sash or frames proving defective in material or workmanship and that it failed to sustain the burden.

The applicable rule is thus stated in Thomas Trustee vs. U. S., 53 Ct. Claims, 430:

> "Where the United States charges against certain retained percentages due the contractor a number of items of expense alleged to have been incurred in completion of the work, they must assume the burden of furnishing such proof as will justify the conclusion that the charges were proper charges."

While there are, counsel believe, other errors of law as they involve neither matters of general principle nor considerable amounts, they are passed over in the interest of the Court's time.

Respectfully submitted,

CHAS. H. MERILLAT,
CHAS. J. KAPPLER,
Attorneys for Appellant.

CONTENTS.

	Page.
STATEMENT	1
THE FACTS	1
ARGUMENT	8
I. APPELLANT ENTERED INTO AN UNAMBIGUOUS CONTRACT, PLAIN AND COMPREHENSIVE IN ITS TERMS, AND AFTER THE CONTRACT WAS EXECUTED AND THE CONSTRUCTION COMMENCED IT PASSED BEYOND THE POWER OF APPELLANT TO ESCAPE THE CONSEQUENCES IN THE ABSENCE OF ANY FINDING OF FRAUD OR MISREPRESENTATION ON THE PART OF THE GOVERNMENT OR ITS OFFICERS OR AGENTS	8
Dermott v. *Jones*, 2 Wall. 1, 7, 8	13
Brinck v. *United States*, 53 Ct. Cls. Rep. 170, 176, 177, 179	14
Carnegie Steel Co. v. *United States*, 240 U. S. 156, 164, 165	15
McArthur Bros. Co. v. *United States*, 258 U. S. 6, 12	16
II. THE LIQUIDATED DAMAGES CLAUSE IS EQUALLY PLAIN AND UNAMBIGUOUS AND THE FINDINGS WOULD INDICATE THAT THE COURT OF CLAIMS DEALT FAIRLY WITH THE APPELLANT	17
Merchants Loan & Trust Co. v. *United States*, 40 Ct. Cls. Rep. 117, 132	25
Chouteau v. *United States*, 95 U. S. 61, 68	26
United States v. *Bethlehem Steel Co.*, 205 U. S. 105, 113, 121	27
Wise v. *United States*, 249 U. S. 361, 365	28
III. THE CHARGE AND ARGUMENT THAT THE ARCHITECT ACTED CAPRICIOUSLY AND THAT THE COURT OF CLAIMS ATTEMPTED IN ITS OPINION TO GET AROUND THE AUTHORITIES CAN NOT BE SUSTAINED	29
Wells Brothers Co. v. *United States*, 254 U. S. 83, 87	31
IV. CONCLUSION	32

CASES CITED.

	Page.
Brinck v. *United States*, 53 Ct. Cls. Rep. 170, 176, 177, 179	14
Carnegie Steel Co. v. *United States*, 240 U. S. 156, 164, 165	15
Chouteau v. *United States*, 95 U. S. 61, 68	26
Dermott v. *Jones*, 2 Wall. 1, 7, 8	13
McArthur Bros. Co. v. *United States*, 258 U. S. 6, 12	16
Merchants Loan & Trust Co. v. *United States*, 40 Ct. Cls. Rep. 117, 132	25
United States v. *Bethlehem Steel Co.*, 205 U. S. 105, 113, 121	27
Wells Bros. Co. v. *United States*, 254, U. S. 83, 87	31
Wise v. *United States*, 249 U. S. 361, 365	28

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

ROY H. ROBINSON, ADMINISTRATOR OF the Estate of John C. Robinson, deceased, *appellant*,
v.
THE UNITED STATES.
No. 335.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Asserting a claim for $123,041.37 (Tr. 11), appellant recovered a judgment for $33,964.10 from which an appeal was taken because of the rejection of a large part of two of the eight principal items. One of the rejected items grows out of the liquidated damages clause of the contract, and the other out of the clause under which the contractor guaranteed the good condition of the work for one year after acceptance. (Tr. 27, Br. 1, 2.)

THE FACTS.

In accordance with the Act approved March 2, 1899, the Secretary of the Treasury accepted plans, drawings, and specifications submitted by Mr. Cass Gilbert for the construction of the United States

Custom House in New York City. (Tr. 13.) The construction was subdivided into several principal parts, (1) the excavation and foundation work; (2) the walls and structural steel work; (3) the mechanical equipment; (4) the interior finish, etc. Separate contracts were let for the different parts. The work commenced and proceeded in the order of the respective parts with some general overlapping of the different contracts with respect to time.

When the construction work progressed to the stage where the interior finish could be commenced the Treasury Department, March 9, 1905, through its Supervising Architect advertised for bids. Because of a probable shortage in the funds available, alternative proposals or bids were requested providing for the omission of certain work and the substitution of less expensive materials in some instances than those provided in the main proposals. (Tr. 13.)

The contract was awarded to John C. Robinson, of Chicago, appellant's decedent, and was entered into August 30, 1905, the contract price being $1,037,281.69. The work was to be completed by October 15, 1906. (Tr. 14, 50.) In the event sufficient funds should subsequently become available for their restoration, 32 omitted items were to be restored.

The pertinent provisions of the contract (Tr. 50, 52), which cover the disputed items are as follows (italics ours):

> It is expressly covenanted and agreed by and between the parties hereto *that time is*

and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of four hundred twenty dollars, for each and every day the said party of the second part shall be in default, which said sum of four hundred twenty dollars per day, in view of the difficulty of estimating such damages with exactness, is hereby expressly *fixed, estimated, computed, determined, and agreed upon* as the damages which will be suffered by the party of the first part by reason of such default, and it is undertood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for.

* * * * *

It is further covenanted and agreed that the party of the first part shall have the right to require that any particular portion of the

work here provided for shall be completed within such time as may be hereafter definitely specified by the said party of the first part in written notice to the said party of the second part; and that should the said party of the second part fail to complete such particular portion of the work within the time so specified, or fail to complete the entire work contemplated by this contract within the time or times herein stipulated or provided for, or fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided, the said party of the first part may withhold all payments for work in place until final completion and acceptance of the same, * * *.

It is further covenanted and agreed that the said party of the first part shall have the right of suspending the whole or any part of the work herein contracted to be done whenever, in the opinion of the Architect of the building, or of the Supervising Architect, it may be necessary for the purposes of advantages of the work, * * * provided, that for all such suspensions and other delays caused by the said party of the first part *the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect;* provided, *that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the said party of the first part.*

The contractor proceeded with the construction. The additional funds having become available, on October 22 and 31, 1906, the Secretary of the Treasury directed the contractor to restore or include in the work the major portion of the 32 omitted items. The contract price was increased $200,044.01, and the period of the contract was extended to June 1, 1907 (Tr. 14, 54), and "*such extension is in lieu of all additional time which accrues to you on account of delays by the Government.*" The contractor and his several sureties consented. (Tr. 56.)

On the items in dispute the Court of Claims made the following Findings: (Tr. 21.)

> XXI. The contract called for most of the window sash of the building to be of solid oak, which wood is not especially suited for a damp climate and locality, such as lower New York City, on account of its liability to warp under damp and changing conditions of moisture and temperature.
>
> The contractor, before putting in the windows, called the architect's attention to this fact and suggested a modification of the form of construction of the sash for the purpose of obviating as much as possible the danger of their warping, which suggestion was not accepted by the architect or department. Owing to the fact above stated, and to the further facts that the materials of some of the sash were not of the best quality, nor thoroughly seasoned, and that the workmanship in their construction and installation was in some instances not of first-class character, there

occurred, before the completion of the building and within one year after the issuance of the department's certificate for final settlement, much warping, shrinking, and misfitting in a very large part of these sash, which required extensive repairs of an expensive character. The department demanded of the contractor that he make these repairs, which he refused to do except as extra work for which he should receive extra compensation. To this the department would not agree. Subsequently the contractor repaired a small part of these windows, about 12 in number, but under written protest and notice to the department that it was extra work for which he expected extra compensation. Later he presented a claim of $1,043.69 for this work, which was disallowed by the department.

XXII. In a report of February 7, 1908, to the Supervising Architect, the architect of the building recommended that the department retain from the contract price for the work the sum of $12,000 for the repair of said window sash and of window frames, and the completion and repair of certain other items of work on the building which the contractor had failed to do, any balance remaining over from the work to be paid to the contractor; and upon this report and recommendation the Supervising Architect, in his report and recommendation of March 13, 1908, to the Secretary of the Treasury for final settlement with the contractor, recommended the retention of said sum for the purpose stated. In accordance with these recommendations said sum was, against the contractor's protest, so retained by the department, and against

this retained sum there were subsequently charged by the department expenditures, etc., as follows: (Tr. 23.)

1. For repairing said window sash, and also some of said window frames, and for repair and completion of some other work which the contractor had failed to perform $10,401.45, the greater part of which sum was for sash repairs.

* * * * *

XXIII. The completion of the contract was delayed 121 days beyond June 1, 1907, the termination of the contract period as extended by the order and supplemental agreement set out in Finding III. Of this delay 12 days were held by defendant to be chargeable to the Government on account of delays in approving and returning the contractor's drawings. The remaining 109 days were held chargeable to the contractor, and liquidated damage therefor at the contract rate of $420 per day, amounting to $45,780, was, against the contractor's protest, charged and retained against him in the department's proffered final settlement on the contract, which sum the defendant still retains.

Of the total delay in the completion of the contract but 61 days' delay was due to the fault of the contractor, the remainder of such delay being due to suspensions and other delays in the work caused by the defendant subsequent to October 22, 1906. The amount of the liquidated damages charged and retained against the contractor by the defendant on account of delay for which the contractor was not responsible, and was therefore not chargeable, was $20,160 (Tr. 23).

37322—23——2

Findings XXI and XXII are assailed on the ground that after the contract was performed and the work was commenced appellant objected to the specifications calling for solid oak sash and specially directed the attention of the Government to the fact that such solid oak sash in window frames would be sure to warp and twist, due to warm inside air and cold outside air, especially in the damp atmosphere of lower New York City.

Finding XXIII is assailed on the ground that as the Government itself was guilty of delays, the Court of Claims had no right to enforce against appellant the liquidated damages clause by apportioning the delays between the parties (Br. 21) and fixing the damages accordingly.

ARGUMENT.

I.

APPELLANT ENTERED INTO AN UNAMBIGUOUS CONTRACT, PLAIN AND COMPREHENSIVE IN ITS TERMS, AND AFTER THE CONTRACT WAS EXECUTED AND THE CONSTRUCTION COMMENCED IT PASSED BEYOND THE POWER OF APPELLANT TO ESCAPE THE CONSEQUENCES IN THE ABSENCE OF ANY FINDING OF FRAUD OR MISREPRESENTATION ON THE PART OF THE GOVERNMENT OR ITS OFFICERS OR AGENTS.

The proposal for interior finish of the United States Custom House at New York, March 9, 1905 (Tr. 30, 40, 49), called for oak window sash (Tr. 38), solid oak interior window frames, frames for first and second stories of quartered white oak (Tr. 38); and elsewhere, including corridors, frames and sash of plain white oak (Tr. 38).

The proposals were made a part of the contract. (Tr. 48, 49.)

The contract provided (Tr. 51):

> It is further covenanted and agreed by and between the parties hereto that *all materials furnished and work done under this contract shall be subject to the inspection of the Architect of the building, the Supervising Architect, the superintendent of the building, and of other inspectors appointed by the said party of the first part, with the right to reject any and all work or material not in accordance with this contract; and the decision of the Architect of the building, when approved by the said Supervising Architect as to quality and quantity shall be final.* And it is further covenanted and agreed by and between the parties hereto that said party of the second part will without expense to the United States, within a reasonable time to be specified by the Architect of the building, or by the Supervising Architect, remedy or remove any defective or unsatisfactory material or work; and that in the event of the failure of the party of the second part immediately to proceed and faithfully continue so to do, said party of the first part may have the same done and charge the cost thereof to the account of said party of the second part.

The proposals which were made a part of the contract also provided (Tr. 32):

> The said Cass Gilbert, either personally, or by duly authorized representative, shall have the power and authority to inspect,

examine, and approve or reject materials, methods, and workmanship furnished or used under this contract, and to direct the conduct, management, and progress of the work and any or all parts of the same, with the exception, that orders involving modifications in the provisions of the contract or in drawings, letters or specifications forming a part thereof shall be subject to and require the written approval of the Secretary of the Treasury.

* * * * *

The Architect shall be the judge as to what constituted a "reasonable notice" to Contractor, whether or not workmanship or materials supplied are "suitable," "proper," "satisfactory," "approved," "necessary," "equal to" or in condition described by words of similar intent.

* * * * *

Inspection:

Each bidder must understand that, should his proposal be accepted, the materials delivered and the work performed by him at any and all times during the progress of the work, shall be subject to the inspection of the Architect or his authorized representative, with the right to accept or reject any part thereof, that, in the opinion of the said Architect or his authorized representative, is not in accordance with the drawings and specifications; and that he must, at his own expense, within a reasonable time to be specified by the Architect, remedy any defective or unsatisfactory material or work, and

in the event of his failure to do so, after eight days' notice, the Department shall have the right to have the same done and to charge the cost thereof to the Contractor's account.

The Court of Claims in its opinion held (Tr. 26):

> The other question involves the withholding by the Government of $12,000, mentioned or referred to in Findings XXI and XXII.
>
> In the contract the contractor undertook to guarantee the condition of the work for one year after acceptance. The sum mentioned was retained to pay for repair work which the contractor was called upon to do. It is true that the contractor suggested that a modification be made in the specification of certain material, and called attention to the fact that this material was not well suited to the climatic conditions, but nevertheless the provision to which he assented was incorporated in and made a part of the contract, and was to the effect that the condition was guaranteed for a definite period. It is too late, after contracting to do the repairs, to interpose the objection that the material (as in this case solid oak) was liable to warp. If it was not his purpose to guarantee the condition when oak was used the contract should not have said what it does say. If it be assumed that his judgment about the material to be used was better than that of the architect, it is yet true that he undertook to do the work, and guaranteed its condition with the material the architect had specified, and having failed and refused to do the repairs, the Government

> was within its rights when it caused them to be done at his expense. We think, however, that the contractor is not chargeable with the item of $1,072.26 for the architect's services, nor for the other item of $205.09, this latter not definitely appearing to be for repair work which the contractor was obligated to do.

Appellant challenges this holding on the ground that the defects "were due to faulty and improper specifications complied with by the contractor only after protest and prediction that strict compliance would result in the very defects which later developed." (Br. 42.) It is further argued "that the matter after all is but a phase of the general legal principle that a party can not recover for his own negligence (Br. 42); and again, "How much the predicted warping affected adjacent material and made possible a claim, after the event, it was not good or well installed in the first place is manifestly impossible." (Br. 43.)

The whole argument of appellant on this point would seem to be against his own contract which he signed and failed fully to discharge. The atmosphere of lower New York was no damper when the oak was placed in the building than it was when appellant signed the contract; nor could it well be claimed that the Government or its Supervising Architect were in any way responsible for the dampness of the atmosphere of lower New York. Moreover, the architect found that some of the work was faulty. That the appellant seeks to escape the consequences of his own contract is clear.

In *Dermott* v. *Jones*, 2 Wall. 1, 7, 8, this Court, speaking through Mr. Justice Swayne, said:

> The specifications and the instrument to which they are annexed constitute the contract. They make a common context, and must be construed together. In that instrument the defendant in error made a covenant. That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well-settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.
>
> * * * * *
>
> The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract

fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.

In *Brinck* v. *United States*, 53 Ct. Cl. Rep. 170, 176, 177, 179, the Court of Claims said:

> The chief engineer, after giving all parties a full hearing, decided that the estimates made and submitted on May 14, 1907, should stand, and upon that basis decided there was due to the contractors the sum of $15,550.90. This sum the contractors refused to receive and brought this suit. The specifications provided:
>
> "Upon all questions concerning the execution of the work, and the classification of the material, in accordance with the specifications, the decision of the engineer shall be binding on both parties."
>
> After a careful review and consideration of the decisions of this court and of the Supreme Court of the United States the following seems to be the well-established rule: Where there is a provision in a contract making the decision of an engineer officer or other officer final as to the quality and quantity, distance to be ascertained, classification of material, or any other subject matter in the contract which may be matter of dispute and which may arise during the execution of the work, the decision of the engineer or other officer will be treated as final by the courts, and will not be subject to review by them in the absence of fraud or such gross error as implies bad faith or a failure to exercise an honest judgment in the premises. *McBride Electric Co.* v. *United*

States, 51 C. Cls. 448, 456; *Pacific Hardware Co.* v. *United States*, 49 C. Cls., 327; *McLaughlin & Co.* v. *United States*, 37 C. Cls., 150, 188; *Barlow et al.* v. *United States*, 35 C. Cls., 514, 546; *Kennedy* v. *United States*, 24 C. Cls., 122, 139; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S., 387, 393; *Ripley* v. *United States*, 233 U. S., 695, 704; *United States* v. *Barlow*, 184 U. S., 123, 133; *United States* v. *Gleason*, 175 U. S., 588, 602, 607; *Chicago, Santa Fe & California Railroad Co.* v. *Price*, 138 U. S., 185, 193; *Martinsburg & Potomac Railroad Co.* v. *March*, 114 U. S. 549, 550; *Sweeney* v. *United States*, 109 U. S., 618, 620; *Kihlberg* v. *United States*, 97 U. S., 398, 401.

* * * * *

And in the same case the court proceeds further to point out that it was not competent for the court to go back of the judgment of the engineer and to revise his action by the views of the court.

Again, in *Ripley* v. *United States*, *supra*, the court in passing upon a clause in a contract similar to the one now under consideration, after stating that there was no finding of bad faith on the part of the officer, said:

"But the contract did not contemplate the opinion of the court should be substituted for that of the engineer."

In *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164, 165, this Court, speaking through Mr. Justice McKenna, said:

It would seem that the very essence of the promise of a contract to deliver articles

is ability to procure or make them. But claimant says its ignorance was not peculiar, that it was shared by the world and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. A successful process was therefore foreseeable and discoverable. And it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition.

But even if this can not be asserted, the case falls within *The Harriman*, *supra*, where it is said that "the principle deducible from the authorities is that if what is agreed to be done is possible and lawful it must be done. Difficulty or improbability of accomplishing the undertaking will not avail defendant. It must be shown that the thing can not by any means be effected. Nothing short of this will excuse performance."

In *McArthur Bros. Co.* v. *United States*, 258 U. S. 6, 12, this Court, speaking through Mr. Justice McKenna, said:

The elements which existed in each of the cited cases are absent from the case at bar. In the case at bar the Government undertook a project and advertised for bids for its performance. There was indication of the manner of performance but there was no knowledge

of impediments to performance, no misrepresentation of the conditions, exaggeration of them nor concealment of them, nor, indeed, knowledge of them. To hold the Government liable under such circumstances would make it insurer of the uniformity of all work and cast upon it responsibility for all of the conditions which a contractor might encounter and make the cost of its projects always an unknown quantity. It is hardly necessary to say that the cost of a project often determines for or against its undertaking.

II.

THE LIQUIDATED DAMAGES CLAUSE IS EQUALLY PLAIN AND UNAMBIGUOUS AND THE FINDINGS WOULD INDICATE THAT THE COURT OF CLAIMS DEALT FAIRLY WITH THE APPELLANT.

The proposals which were made a part of the contract provide (Tr. 31) (italics ours):

> Delays: Each bidder must submit his proposal with the distinct understanding that, in case of its acceptance, *time for the completion of the work shall be considered as of the essence of the contract, and that for the cost of all extra inspection, and for all amounts paid for rents, salaries of contingent force, and other expenses entailed upon the Government by delay in completing the contract, the United States shall be entitled to the fixed sum of Four hundred and twenty dollars ($420.00) as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States: Provided, however, That the collection of said sum may, in the discretion of the Secretary,*

be waived in whole or in part; and that the contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government.

The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract, whenever, in its opinion, it would be inexpedient to carry on said work. * * *

Time to Complete: Work must begin shortly after the contract is signed, and the entire work must be completed on or before July 15, 1906. The bidder will consider this as an essential item in preparation of his bid.

Bidders must also understand that *in the performance of work in the building by various contractors at the same time, some hindrance and delay in execution of certain plans for progress will be probable and allowance be made therefor. Time is held to be an essential consideration of this contract,* and it is hereby particularly required and provided that this work as a whole, and any and all parts of the same, shall progress at all times with a proper and sufficient force of workmen and an ample supply of materials, and the work shall be conducted and managed in a manner satisfactory to the Architect, and which, in the opinion of the Architect and Supervising Architect, shall insure its completion within the time stipulated.

The contract of which the proposals were made a part provides (Tr. 52, 53):

It is further covenanted and agreed that the said party of the first part shall have the

right of suspending the whole or any part of the work herein contracted to be done whenever, in the opinion of the Architect of the building, or of the Supervising Architect, it may be necessary for the purposes or advantages of the work, and upon such occasion or occasions the said party of the second part shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; provided, that for all such suspensions and other delays caused by the said party of the first part the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect; *provided, that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the said party of the first part.*

The amendment or supplement to the contract of October 22, 1906, provides (Tr. 54):

> It is understood and agreed that it is a condition of this action that the time for completion of all work included in your contract, and that hereby ordered, is June 1, 1907, and that such extension is in lieu of all additional time which accrues to you on account of delays by the Government * * *.

In its opinion the Court of Claims said (Tr. 24, 25, 26) (italics ours):

> The contract contains a clause providing for liquidated damages to be paid by the contractor in case he fails to perform within contract time. The act of 1902, 32 Stat. 326, requires that clause in contracts such as this.
>
> The work was not completed or accepted until October, 1907, or 121 days after the stipulated time in the supplemental contract, namely, June 1, 1907. In the attempted adjustment of that matter as made by the Treasury Department, of which the contractor complains, he was charged with 109 days' delay, the remaining 12 days having been deducted from the total because of delay by the Government in furnishing "certain drawings." The act of 1902 mentioned in the specifications empowers the Secretary of the Treasury to remit the whole or any part of the liquidated damages as in his discretion may be just and equitable. This act, being in existence when the plaintiff's contract was made, must be read into the contract itself. In determining whether anything would be remitted the Secretary did not feel bound by the contract provision relative to the ascertainment of a cause of delay by the supervising architect, but appointed a board to investigate the facts and report to him with their recommendation as to whether any waiver of the liquidated damages should be made by him.
>
> While it is argued with much force by the Government that this action of the Secretary

is conclusive on the parties, we think the better view is against that contention when all the terms of the contract are considered. It provided that the Government could suspend the work in whole or in part, and that for "all such suspensions" and other delays caused by the Government an allowance should be made to the contractor, and it also provided that no claim for damages should be made by, or allowed to, the contractor for any damages arising out of delays caused by the Government. This latter provision is valid and enforceable against the contractor, *Wells Bros. Co. Case*, 254 U. S. 83, 87 (54 C. Cls., 206), but the former provision requires that some account be taken of the "suspensions" in ascertaining what, if any, additional days' time should be allowed the contractor. It is not every suspension of part of the work that will give the contractor additional time, but it must have been such a suspension of part that has operated to delay the whole work. If there were a suspension of a part that had no effect on the balance of the work, or where the contractor could proceed with other of the work unhindered by the particular suspension, it could not be said to have delayed the ultimate performance of the whole so as to entitle him to additional time.
* * *

The contention by the plaintiff that he is not chargeable with any liquidated damages can not be sustained. The case of United Engineering Co., 234 U. S. 241, is not applicable to the instant case. The contract provides

a definite period from which the liquidated damages are to be computed, and in case of delays by the Government or suspensions, in the circumstances stated above, it is provided that one day be added to the contractor's time for each day of delay. *These delays being ascertained, the time of completion is as definitely fixed as if written in the contract itself. The theory that the entire liquidated clause is defeated by a provision intended to protect and save it, and at the same time to accord to the contractor some relief, is not to be adopted where the contract shows plainly that its intent is to furnish the means of definitely ascertaining the period during which the contractor should be charged with the agreed damages. There is no question here of an apportionment of delays.* The contract itself requires that under certain stated conditions additional days shall be given in which the contractor may perform, and it is the duty of the court to give effect to this provision. We have therefore ascertained the number of days which should be added to the contract period from June 1 and extended the time accordingly, as contemplated by the clause under consideration.

The whole argument of counsel for appellant appears to be that the Court of Claims, regardless of these specific provisions in the proposals and contract, apportioned the delays as between the parties and under the contract allowed liquidated damages against appellant. And numerous authorities are cited to sustain the proposition that liquidated damages may not be recovered for delay in discharging the contract

when both parties are at fault. But there is no such case here.

The proposals and the contract provide that the United States shall be entitled to $420 "as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States" (Tr. 31); and then it is provided "that the contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government." (Tr. 31.) Under his authority to waive any part of the liquidated damages (Tr. 31), the Secretary of the Treasury, in extending the time for the completion of the work from October 15, 1906 (Tr. 14), to June 1, 1907 (Tr. 54), stated that "such extension is in lieu of all additional time which accrues to you on account of delays by the Government" (Tr. 54).

It would appear that the Court of Claims dealt very liberally with the appellant. Thus, with respect to Finding XXIII (and taking into account that certain suspensions on the part of the Government which were not lifted when the agreement of October 22, 1906, was made extending the time to complete the work to June 1, 1907), the Court of Claims said (Tr. 25):

> We are not concerned with suspensions prior to the supplemental contract of October, 1906, because that contract extended the time of performance and took account of delays to that time, but if a suspension made prior to the October contract on part of the work was

not lifted until after that date, and if such continued suspension of part so affected the whole of the work as to delay its completion within the contract time, then the suspension becomes material. And an instance of that kind happened. In August, 1906, an order directed the suspension of certain work, including marble work on the Bridge Street stairway No. 116, and the order to resume work was not issued until the end of March following—more than six months. The architect himself states that the contractor was delayed by these items and would doubtless claim exemption upon them, but also concluded that the primary cause of the delay was the contractor's refusal to submit a reasonable bid for certain work. We take a different view of this matter and hold that inasmuch as the department could have fixed the price it need not have waited upon the contractor's bid, and in fact did not so wait, and that the suspension made in August and continued until nearly April did operate to delay completion of the work, which according to the supplemental contract was due to be completed by June 1. As early as December, and several times thereafter, the contractor had called on the department to be allowed to proceed with incidents connected with this particular work. We have not found that a period equal to the entire time of the suspension should be added to the time the contractor had within which to complete, but that a portion of it should be so added. Similarly, on account of other suspensions the contractor

should have additional time. The extension of one day for each day's delay in the performance of the entire work caused by suspensions at divers times of parts of the work has been found in Finding XXIII.

Counsel argues that the Court of Claims simply apportioned the delays on a fifty-fifty basis and awarded judgment accordingly.

Any examination of the Findings and opinion of the Court of Claims would indicate that the latter examined the evidence and under the terms of the contract computed the delays of the respective parties. Full allowance was made to appellant for the delays caused by the Government. That the Court of Claims was liberal in that behalf clearly appears from its opinion already cited.

In *Merchants Loan & Trust Co.* v. *United States*, 40 Ct. Cls. Rep. 117, 132, the Court of Claims said:

> The legal effect of the part of the contract referred to is that the entire work covered by the contract was to be completed within eight months from the date of the approval of the bond, and that any particular portion of the work should be completed within such reasonable time as might thereafter be definitely specified in written notice to the contractor, and should there be a failure to so complete the work in the time required the contractor should forfeit $200 per day as liquidated damages thereafter until the completion of the same, provided that if through any fault of the defendants the contractor should be de-

layed in the execution of the work included in the contract he should be allowed one day additional to the time stated for such completion for each and every day of such delay so caused by the defendants, and that no claim should be made or allowed for damages which might arise out of any delay caused by the defendants.

The provisions of the contract just recited are as valid and binding as any other part of it, and having been voluntarily entered into the contractor has agreed that no claim shall be made or allowed arising out of the delay caused by the defendants mentioned in the findings. Extra time to the contractor was made the equivalent for delay caused by the defendants; and the claimant has not shown that such extra time was refused by the defendants.

In respect to the right to recover damages for delays the contract is purely unilateral and is confined to such damages as might be caused by the contractor alone, and for the delays caused by the defendants there can be no recovery.

In *Chouteau* v. *United States*, 95 U. S. 61, 68, this Court, speaking through Mr. Justice Miller, said:

It is very clear that both parties contemplated the probability that the work would not be completed at the precise period of eight months from the date of the contract. They also contemplated that changes would be made in the construction of the battery. They made such provision for these matters as they

deemed necessary for the protection of each party. For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made. There was a provision for delay, by which the contractor was to submit to pay $4,500 for every month of that delay. This provision, the only one on that subject, if strictly enforced, might have made him a still greater loser; but it seems to have been waived. But we are very clear that without any such provision he must be held to have taken the risk of the prices of the labor and materials which he was bound to furnish, as every other contractor does who agrees to do a specified job at a fixed price. It is one of the elements which he takes into account when he makes his bargain, and he can not expect the other party to guarantee him against unfavorable changes in those prices.

In *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 113, 121, this Court, in reversing a judgment of the Court of Claims with directions that the petition be dismissed, said:

> The eighth finding of the Court of Claims is in effect that the failure to deliver was caused in part by both parties; that the total number of days failure was 1,096 days, of which 496 were caused by the defendant's officers, and it does not mean that the court regarded itself as bound by the decision of the Chief of Ordnance as to the number of days that the claimant or the Government delayed the delivery. It

found the number of days as stated, and that the transactions were so involved that whether the defendant should be charged with a greater proportion of the delays than set forth in the finding, the court could not decide on the evidence produced.

In *Wise* v. *United States*, 249 U. S. 361, 365, this Court, in affirming a judgment of the Court of Claims in a case in which the provisions of the contract were again almost an exact duplicate of the provisions of the contract here involved, and speaking through Mr. Justice Clarke, said:

> The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642, applied in *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, and the result of the modern decisions was determined to be that in such cases courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipu-

lated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention, or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

III.

THE CHARGE AND ARGUMENT THAT THE ARCHITECT ACTED CAPRICIOUSLY AND THAT THE COURT OF CLAIMS ATTEMPTED IN ITS OPINION TO GET AROUND THE AUTHORITIES CANNOT BE SUSTAINED.

The charge in the petition (Tr. 5) "That the architect was capricious, unfair, and unreasonable in the supervision and judgment of work, labor, and materials and unreasonably and unwarrantably rejected material and labor after the same were long in place though having full and early opportunities for inspection of materials and of labor," and the further charge (Tr. 5) that claimant "was subjected to unreasonable and capricious delays and losses in other details of performance of his contract that were vexatious, harassing, and embarrassing, but were submitted to rather than vex the appellate authorities with the same," and that "these capricious, unfair, and unreasonable acts delayed claimant in performance of his contract and increased the cost thereof" (Tr. 5) are not borne out by the record.

Moreover, pursuing these charges against Mr. Cass Gilbert,[1] who was the architect in charge, counsel for appellant in their brief say (Br. 36):

> He was the legal representative of one party to the contract, and not even an unbiased representative, for he had tried to prevent appellant as the lowest bidder getting the contract and with the architect was overruled by the Secretary. Appellant's troubles began that day.

Appellant appears to adopt very much the same attitude toward the Court of Claims, for with respect to the opinion of the latter, counsel say (Br. 33, 34):

> The Court of Claims attempts in its opinion to get around these authorities and to hold they do not apply with the assertion that it, in its conclusion awarding the amount in dispute as to 60 days at $420 per day to the contractor and 61 days to the United States, is not "apportioning" the delay due to mutual defaults, that *United Engineering Co.* v. *The United States*, *supra*, is not applicable, and that it is, instead of "apportioning" the time between owner and contractor, "computing" the same under a contract provision not nam-

[1] Architect for the Capitol and other buildings, St. Paul; Essex County house, Newark, N. J.; Agriculture Building, Omaha Exposition, 1898; Brazer Building in Boston; Broadway-Chambers Building, New York; West Street Building, Woolworth Building, and U. S. Custom House, New York; Art Building and Festival Hall, St. Louis Exposition; Central Public Library, St. Louis; Detroit Public Library; general plan of University of Minnesota, University of Texas, and for completion Arkansas Capitol, Little Rock; U. S. Treasury Annex, Washington, D. C.; Army Supply Base, Brooklyn, N. Y.; Federal Reserve Bank, Minneapolis; one of architects new Union Club, New York. (Who's Who in America, Vol. 12, 1922-1923, Cass Gilbert.)

ing a date but enabling one to be definitely fixed—by computing or apportioning the fault between the parties. To Counsel it seems like an advocate's special pleading of a hard case, swaying the law not interpreting it.

In *Wells Brothers Co.* v. *United States*, 254 U. S. 83, 87, in affirming the judgment of the Court of Claims, dismissing a petition based on a contract the provisions of which, as the face of this Court's opinion will disclose, were almost a duplicate of the provisions of the contract in the instant case, and after reviewing the various provisions of the contract, Mr. Justice Clarke, speaking for the Court, said:

> Men who take million-dollar contracts for Government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price exacted for the work.
>
> We are dealing with a written contract, plain and comprehensive in its terms and the case is clearly ruled in principle by *Day* v. *United States*, 245 U. S. 159, 161; *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164, 165; *Dermott* v. *Jones*, 2 Wall. 1, 7, and *Chouteau* v. *United States*, 95 U. S. 61, 67, 68.

IV.

CONCLUSION.

The findings and opinion of the Court of Claims, and the course of the Government in not prosecuting a cross appeal, all protect appellant to the fullest extent to which he is entitled. The judgment of the Court of Claims should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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ROBINSON, ADMINISTRATOR OF ROBINSON, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 335. Argued March 16, 1923.—Decided April 9, 1923.

1. Stipulations in construction contracts obliging the contractor to pay liquidated damages for each day's delay, are appropriate means of inducing due performance and of affording compensation in case of failure to perform, and are to be given effect according to their terms. P. 488.
2. Where a public building contract obliged the contractor to pay liquidated damages for each day's delay not caused by the Government, and delays were attributable to both parties, *held* that the Government was entitled to the damages for the part of the delay specifically found by the Court of Claims to have been due wholly to the fault of the contractor. *Id.*
3. Where defects in a building result partly from the character of materials expressly required by the building contract and partly from the fault of the contractor, the fact that the contractor pointed out the unsuitability of the material specified and suggested a substitute, after the contract was made, does not relieve him of the obligation to repair the defects under his guaranty of the condition of the work for a stated period after its acceptance. P. 489.

57 Ct. Clms. 7, affirmed.

APPEAL from a judgment of the Court of Claims sustaining, in part only, the appellant's claim for moneys due under a building contract.

Mr. Chas. H. Merillat, with whom *Mr. Chas. J. Kappler* was on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On August 30, 1905, claimant's intestate entered into a contract with the United States to instal the interior fin-

ish in the custom house building then being constructed in New York City pursuant to Act of March 2, 1899, c. 337, 30 Stat. 969. The contract price was $1,037,-281.69; and the time for completion of the work, October 15, 1906. Before it had been completed, but after that date, a supplemental agreement was made, which provided for additional work; increased the contract price $200,041.01; and extended the time for completion to June 1, 1907. The work was not completed until 121 days after that date. The Government insisted that only 12 days of this delay were chargeable to it; and that the contractor was liable in liquidated damages for $420 for each of the remaining 109 days' delay. It, therefore, deducted $45,780 from the amount otherwise payable to the contractor.

To recover that sum (and others) the contractor brought this suit in the Court of Claims. He contended that, since the Government had caused some of the delay, the provision for liquidated damages became wholly inapplicable and was unenforceable; and that, since the Government had failed to prove actual damage, it was not entitled to any damages whatsoever. The court found that of the 121 days of delay, only 61 days were chargeable to the contractor; and that the remainder were caused by the Government, after the date of the supplemental contract. It accordingly gave the claimant judgment (among other things) for $20,160, being that part of the amount withheld which represented the delay in excess of 61 days. 57 Ct. Clms. 7. The case is here on claimant's appeal. Whether on these facts the provision for liquidated damages governs is the main question for decision.

The original contract provided that the contractor " shall be allowed one day, additional to the time herein stated, for each and every day of . . . delay [that may be caused by the Government] "; " that no claim shall be

made or allowed to . . . [the contractor] for any damages which may arise out of any delay caused by . . . [the Government] "; and that the contractor shall pay $420 for each and every day's delay not caused by the United States. The supplemental contract provided that the extension then granted was in lieu of all additional time which had accrued to that date "on account of delays by the Government." The construction of the contract and the findings of fact are clear. If the provision for liquidated damages is not to govern, it must be either because, as matter of public policy, courts will not, under the circumstances, give it effect (even as a defense) or, because in spite of the explicit finding, no day's delay can, as matter of law, be chargeable to the contractor, where the Government has caused some delay. Neither position is tenable.

The provision is not against public policy. The law required that some provision for liquidated damages be inserted. Act of June 6, 1902, c. 1036, § 21, 32 Stat. 310, 326. In construction contracts a provision giving liquidated damages for each day's delay is an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform; and courts give it effect in accordance with its terms, *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642, 673, 674; *Wise* v. *United States*, 249 U. S. 361; *J. E. Hathaway & Co.* v. *United States*, 249 U. S. 460, 464. The fact that the Government's action caused some of the delay, presents no legal ground for denying it compensation for loss suffered wholly through the fault of the contractor. Since the contractor agreed to pay at a specified rate for each day's delay not caused by the Government, it was clearly the intention that it should pay for some days' delay at that rate, even if it were relieved from paying for other days, because of the Government's action. If it had appeared that the first 61 days' delay had been due wholly

to the contractor's fault, and the Government had caused the last 60 days' delay, there could hardly be a contention that the provision for liquidated damages should not apply. Here the fault of the respective parties was not so clearly distributed in time; and it may have been difficult to determine, as a matter of fact, how much of the delay was attributable to each. But the Court of Claims has done so in this case. Its findings are specific and conclusive. Compare *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 121; *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 163, 164. The case is wholly unlike *United States* v. *United Engineering Co.*, 234 U. S. 236, upon which claimant relies. The question there was one of construction. The lower court found as a fact that, but for the Government's action, the work would have been completed within the contract period; and this Court construed the provision for liquidated damages as not applicable to such a case. Here the question is not properly one of construction.

It is also assigned as error that the court sustained a deduction by the Government from the contract price of the amount paid by it for certain repairs. The contract contained a guarantee by the contractor of the condition of the work for one year after acceptance. The specifications provided for window sashes of solid oak. After the contract had been signed, and before putting in the windows, the contractor called the architect's attention to the fact that solid oak is not well suited for a damp climate and locality, like that of lower New York City; and he suggested a modification of the specifications to avoid warping. The suggestion was not accepted. By reason, in part, of warping which occurred within a year after acceptance of the work, extensive repairs became necessary. He was requested by the Government to make the repairs, but refused to do so. Then the Government had them made by others. The Court of Claims found that

owing partly to the fact that oak is not suitable to the climate and partly "to the further facts that the materials of some of the sash were not of the best quality, nor thoroughly seasoned, and that the workmanship in their construction and installation was in some instances not of first-class character, there occurred . . . much warping . . . which required extensive repairs of an expensive character."

The contractor contends that the Government's refusal to adopt the modification proposed relieved him from the obligation under the guarantee. The contention is unsound. He entered into a contract plain and comprehensive in terms. There was no finding of mutual mistake, or of fraud, misrepresentation or concealment on the part of the Government or any of its officers or employees. Under such circumstances, the contractor cannot be relieved from an obligation deliberately assumed. *Wells Brothers Co.* v. *United States*, 254 U. S. 83; *MacArthur Brothers Co.* v. *United States*, 258 U. S. 6. If the warping had been caused entirely by the adoption of wood unsuitable to the climate, it may be that, as a matter of construction, the guarantee would not extend thereto. But the findings do not present such a case. The case is wholly unlike *United States* v. *Spearin*, 248 U. S. 132; *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1; *United States* v. *Smith*, 256 U. S. 11.

Affirmed.